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APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1244

A. T. GORDON, ET AL.,
PETITIONERS

v.

GRANVILLE H. LANCE, ET AL.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF APPEALS OF WEST VIRGINIA

PETITION FOR CERTIORARI FILED FEBRUARY 26, 1970
CERTIORARI GRANTED APRIL 6, 1970

APPENDIX I

ORDER DENYING MOTION FOR REHEARING

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 2d day of December, 1969, the following order was made and entered, to-wit:

GRANVILLE H. LANCE, ET AL. Plaintiffs Below, *Appellants*

12809 vs.

THE BOARD OF EDUCATION OF THE COUNTY OF ROANE, a corporation, JOHN W. STONE, ET AL., MEMBERS OF THE BOARD OF EDUCATION OF THE COUNTY OF ROANE, and MIRRELL CLARK, Superintendent of Schools of Roane County, West Virginia, Defendants Below, *Appellees*, A. T. GORDON, ET AL., *Intervenors as Parties Defendant*

This proceeding came on this day for consideration upon the order of this Court entered July 8, 1969, reversing the judgment of the Circuit Court of Roane County rendered November 22, 1968; upon the written opinion filed with the record wherein the Court held in part that the three-fifths vote requirement of Article X, Section 8 of the Constitution of West Virginia and the sixty percent vote requirement of Article X, Section 1 of the Constitution of West Virginia are in conflict with and violative of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and are therefore unconstitutional and unenforce-

able; upon the motion of Judge Haymond, timely filed, for rehearing upon the Court's own motion; upon the motion of A. T. Gordon, George Moffatt, V. E. Greenleaf, C. C. Conley, H. G. Everly, Roy R. Griffith, J. E. Oakley, Harlan H. Alvis, Carl Mace, C. Roy Keith, C. A. Parsons, Charles Hickman, Robert J. Knopp, Charles T. Knopp, Hubert Jones and A. D. Lupardus for leave to intervene as parties defendant; upon the order of this Court entered October 3, 1969, granting a rehearing for the limited purpose of considering the motion for leave to intervene and setting the matter for hearing; upon the arguments and briefs of counsel thereon; upon the order of this Court entered November 10, 1969, and subsequent opinion, granting said motion to intervene and making said movants parties defendant herein; and upon the petition for rehearing and reargument filed by said intervenors as parties defendant on November 21, 1969, upon mature consideration of all of which a majority of the Court is of opinion to and doth deny the prayer of the petition for rehearing and reargument and doth order that the final order entered herein on July 8, 1969, be made absolute and certified as heretofore directed. Judge Haymond would grant.

A True Copy.

Attest: (George W. Singleton)

Clerk Supreme Court of Appeals

APPENDIX 2A

Plaintiffs' Complaint Without Exhibits

IN THE CIRCUIT COURT OF ROANE COUNTY, WEST VIRGINIA

GRANVILLE H. LANCE, FRED HILL, CHESTER C. DODD, JR., BRADY D. HICKEL JR. and JOE A. CRADDOCK,

Plaintiffs,

vs.

THE BOARD OF EDUCATION OF THE COUNTY OF ROANE, a corporation, JOHN W. STONE, CHARLES ELBA ROBINSON, H. D. JONES, BENJAMIN HICKEL and JOHN N. COTTLE, Members of the Board of Education of the County of Roane and MIRRELL CLARK, Superintendent of Schools of Roane County, West Virginia,

Defendants.

Civil Action No. 1062

DECLARATORY JUDGMENT

COMPLAINT

1. This action is brought under the provisions of Chapter 55, Article 13, of the Code of West Virginia for declaratory relief and such further relief as may be necessary and proper. It involves the constitutionality of Code 13-1-4 and 14 and other provisions of the Constitution and statutes of West Virginia and a copy of this complaint is therefore served upon the Attorney General of this State pursuant to Code 55-13-11.

2. Each of the plaintiffs is a citizen and taxpayer of Roane County, West Virginia, and the owner of real

and personal property situate, assessed and taxed in Roane County. Each of the plaintiffs is a voter in the Roane County School District and Roane County, West Virginia, qualified to vote upon questions connected with the contracting of debt and issuing of bonds by the Board of Education of Roane County, and each voted "yes" on the question of the issuance of $1,830,000 bonds by the Board of Education of the County of Roane at a special election ordered by the Board and held in the Roane County School District on April 29, 1968, which election is hereinafter more particularly described. Plaintiffs bring this action and file their complaint, jointly and severally, on their own behalf, and on behalf of all qualified voters of the Roane County School District and Roane County, West Virginia similarly situated, or, in the alternative, on behalf of all qualified voters of the Roane County School District and Roane County, West Virginia.

The defendant, The Board of Education of the County of Roane (sometimes referred to as "the Board" is a body corporate organized and existing pursuant to the laws of the State of West Virginia, and as such is charged by law with the supervision and control of all schools and school interests in Roane County, West Virginia, including the issuance and sale of its bonds pursuant to the provisions of Chapter 13, Article 1, of the Code of West Virginia, 1931 as amended, the construction and validity of Section 14 thereof, being the matter at issue in this proceeding. Defendants John W. Stone, Charles Elba Robinson, H. D. Jones, Benjamin Hickel and John N. Cottle, (sometimes referred to as the "Board Members") are the only elected and qualified members of the Board. Defendant Mirrell Clark (sometimes referred to as the Superintendent) is the Superintendent

of Schools of Roane County, West Virginia and *ex officio* Secretary of the Board.

3. There have been no new schools or major additions or improvements to existing schools in Roane County since 1946 when the voters authorized the issuance of $5,000,000 bonds for such purpose. Since that time only minor improvements have been made to existing facilities, the outlays for such improvements averaging less than 4% of the annual budget for current expenditures. As a consequence the schools in the county have become old and inadequate for modern educational needs. There are an average of 31.2 pupils per elementary classroom and 25.5 pupils per secondary classroom in 1966-1967 compared with the state average of 28 pupils per elementary classroom and 23.6 pupils per secondary classroom. Many of the classrooms and other facilities are makeshift in nature resulting from efforts to adapt old facilities to existing needs. Dangerous conditions have been created by the deterioration of many of the school structures. At least two major schools within the county, Spencer Elementary School and Spencer High School, have serious fire hazards which have resulted in orders from the State Fire Marshall and the State Superintendent of Schools closing certain parts of the facilities, prohibiting their further use until the conditions have been corrected and eliminated. Copies of the reports of the State Fire Marshall upon such fire hazards and the order of the State Superintendent of Schools and the State Fire Marshall ordering the immediate closure of portions of those schools are attached to and made a part of this complaint marked "Exhibit A".

4. New construction and major improvements to

existing facilities are necessary to provide modern up-to-date facilities for the education of the youth of Roane County. During the past decade the Board has attempted to provide funds for the essential new construction and major improvements to existing facilities by seeking authority for the issuance of bonds and for the laying of additional levies, a portion of which would be used for such purposes, but on each occasion it was unable to secure the necessary 60% vote in favor of the authorization of the issuance of the bonds or the laying of the additional levies as required by the laws of the state. A summary of the propositions submitted by the Board to the voters since 1960, and the votes cast for and against the same, is set forth in the schedule attached to and made a part of this complaint marked "Exhibit B". Plaintiffs have been active in their support of the efforts of the Board to provide funds for the necessary new construction and major improvements to existing facilities, contributing their time, efforts and resources in support of the approval of the bond and additional levy questions submitted to the voters, and voting for the passage of each. Upon the failure of the bond issue and additional levy propositions submitted to the voters by the Board at a special election held on March 22, 1968, the Board, at the instance of plaintiffs and other interested citizens and voters of Roane County, agreed to resubmit such questions to the voters. The special election on the question of the issuance of $1,830,000 bonds thereupon ordered by the Board at its special meeting on March 27, 1968, is the subject matter of this action.

5. On April 29, 1968 the Board, pursuant to Chapter 13, Article 1 of the Code of West Virginia, submitted to the vote of the qualified voters of the Roane County

School District the question of incurring and issuing bonds in the amount of $1,830,000, to run not more than twenty years from the date thereof, with interest not exceeding the rate of five and one-half percent (5½%) per annum, for the purpose of alleviating overcrowding of classrooms and facilities, removing fire hazards, providing vocational education facilities, providing more modern and adequate educational facilities, and meeting the needs of the educationally disadvantaged children. A true copy of the order adopted by the Board at its meeting on March 27, 1968, ordering the question submitted to the voters at the special election is attached to and made a part of this complaint marked "Exhibit C". A sample copy of the form of ballot upon which the qualified electors cast their votes for and against the proposition is attached and made a part of this complaint marked "Exhibit D".

At the election 2,887, or 51.55% of the total number of votes cast, were cast for the proposition for incurring of the debt and issuance of the bonds and 2,713 votes, or 48.45% of the total number of votes cast, were cast against the proposition, so that more than a majority but less than three-fifths of all of the votes cast upon the proposition voted in favor thereof. A photographic copy of the Certificate of the Board of Canvassers which examined the returns of the special election is attached to and made a part of this complaint marked "Exhibit E".

6. Chapter 13, Article 1 of the Code of West Virginia, 1931 as amended, authorized a school district, by and through its Board of Education, to issue and sell its bonds in the manner and subject to the conditions contained in the article. The authority granted is limited

by Article 10, Section 8 of the Constitution of West Virginia which provides as follows:

> "§8. No county, city, school district, or municipal corporation, except in cases where such corporations have already authorized their bonds to be issued, shall hereafter be allowed to become indebted, in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate, exceeding five per centum on the value of the taxable property therein to be ascertained by the last assessment for State and county taxes, previous to the incurring of such indebtedness; nor without, at the same time, providing for the collection of a direct annual tax on all taxable property therein, in the ratio, as between the several classes or types of such taxable property, specified in section one of this article, separate and apart from and in addition to all other taxes for all other purposes sufficient to pay, annually, the interest on such debt, and the principal thereof, within, and not exceeding thirty-four years, such tax, in an amount sufficient to pay the interest and principal on bonds issued by any school district not exceeding in the aggregate three per centum of such assessed value, may be levied outside the limits fixed by section one of this article: Provided, that no debt shall be contracted under this section, unless all questions connected with the same, shall have been first submitted to a vote of the people, and have received three-fifths of all the votes cast for and against the same."

Pursuant to the constitutional limitations, Section 4 and 14 of Chapter 13, Article 1 provide:

> "§13-1-4. *Bond Issue proposal to be submitted to voters; election order.* No debt shall be contracted or bonds issued under this article until all questions connected with the same shall have been first submitted to a vote of the qualified electors of the

political division for which the bonds are to be issued, and shall have received three fifths of all the votes cast for and against the same. The governing body of any political division referred to in this article may, and when requested so to do by a petition in writing, praying that bonds be issued and stating the purpose and amount thereof, signed by legal voters of the political division equal to twenty per cent of the votes cast in a county or magisterial district for governor, or in a municipal corporation or school district for mayor or member of the board of education, as the same may be, shall, by order entered of record, direct that an election be held for the purpose of submitting to the voters of the political division all questions connected with the contracting of debt and the issuing of bonds. Such order shall state:

(a) The necessity for issuing the bonds, or, if a petition has been filed as provided herein, that such petition has been filed;

(b) If for the construction of a county-district road or bridge thereon, a summary of the engineer's report provided for in the following section (§ 13-1-5) setting forth the approximate extent and the estimated cost of the proposed improvement and the kind or class of work to be done thereon;

(c) Purpose or purposes for which the proceeds of bonds are to be expended;

(d) Valuation of the taxable property as shown by the last assessment thereof for State and county purposes;

(e) Indebtedness, bonded or otherwise;

(f) Amount of the proposed bond issue;

(g) Maximum term of bonds and series;

(h) Maximum rate of interest;

(i) Date of election;

(j) If a special election, names of commissioners for holding same;

(k) If registration of voters is necessary, notice of the time, place and manner of making same;

(l) That the levying body is authorized to lay a sufficient levy annually to provide funds for the payment of the interest upon the bonds and the principal at maturity, and the approximate rate of levy necessary for this purpose;

(m) In the case of school bonds, that such bonds, together with all existing bonded indebtedness, will not exceed in the aggregate five percent of the value of the taxable property in the school district ascertained in accordance with section 8, article X of the Constitution; and that such bonds will be payable from a direct annual tax levied and collected in each year on all taxable property in such school district sufficient to pay the principal and the interest maturing on such bonds in such year, together with any deficiencies for prior years, within, and not exceeding thirty-four years, which tax levies will be laid separate and apart and in addition to the maximum rates provided for tax levies by school districts on the several classes of property in section 1, article X of the Constitution, but in the same proportions as such mixiumum rates are levied on the several classes of property; and said tax may be levied outside the limits fixed by section 1, article X of the Constitution.

Any other provision which does not violate any provision of law, or transgress any principle of public policy, may be incorporated in the order."

"§ 13-1-14. *Resolution authorizing issuance and fixing terms of bonds.* If three fifths of all the votes cast

for and against the proposition to incur debt and issue negotiable bonds shall be in favor of the same, the governing body of the political division shall, by resolution, authorize the issuance of such bonds in an amount not exceeding the amount stated in the proposition; fix the date thereof; set forth the denominations in which they shall be issued, which denominations shall be one hundred dollars or multiples thereof; determine the rate of interest which the bonds shall bear, which rate of interest shall be within the maximum rate stated in the proposition submitted to vote and payable semiannually, and shall in no case exceed six percent per annum; prescribe the medium with which the bonds shall be payable; require that the bonds shall be made payable at the office of the State treasurer and at such other place or places as the body issuing the same may designate; provide for a sufficient levy to pay the annual interest on the bonds and the principal at maturity; fix the times within the maximum period, as contained in the proposition submitted to vote, when the bonds shall become payable, which shall not exceed thirty-four years from the date thereof; and prescribe a form for executing the bonds authorized."

7. The effect of the three-fifths requirement of Article 10, Section 8 of the Constitution of West Virginia and Sections 4 and 14 of Chapter 13, Article 1 of the Code of West Virginia is to debase the votes of plaintiffs and others voting for the issuance of the bonds and to give the vote of each person voting against the issuance of the bonds fifty percent greater weight than is awarded to each of the favorite votes, two votes against the issue being the equal of three votes in favor of the issue. Such an arbitrary and discriminatory requirement defeats the will of the majority and results in a distortionment of the constitutional system established by the Constitu-

tion of the United States and the Constitution of the State of West Virginia, and is contrary to the majoritarian principle of representative government which is basic to a republican form of government and Anglo-Saxon jurisprudence. Its effect is to maintain the control of the fiscal policies of the county in the hands of a minority of its citizens, enabling such minority to thwart the will of the majority to provide for the improvements necessary to meet the educational requirements of the county. In Roane County the control of the minority has been absolute since 1960 (Exhibit B). Statewide, during the same period in 41 of 76 special elections where the bond issue or the excess levy proposition was defeated, more than fifty percent of the votes cast were in favor of the proposition. (excess levy elections require the same three-fifths vote) A summary of school bond and excess levy elections from 1960-1961 through 1967-1968 is attached to and made a part of this complaint marked "Exhibit F". As a result of the arbitrary and discriminatory three-fifths requirement of Article 10, Section 8 of the Constitution of West Virginia and Section 4 and 14 of Chapter 13, Article 1, of the Code of West Virginia, plaintiffs and all other persons voting with the majority at the special bond election ordered by defendant, Board, which is the subject matter of this proceeding, and at all bond and excess levy elections held within the state, by virtue of the debasement of their votes are denied the equal protection of the laws accorded them by the Fourteenth Amendment to the Constitution of the United States, and by virtue of the vesting of a minority of the citizens with the power to thwart the will of the majority are denied the Republican Form of Government guaranteed unto every State and

their citizens by Article 4, Section 4 of the Constitution of the United States.

8. Plaintiffs appeared before the Board at its special meeting held on March 27, 1968 and represented to the Board that the three-fifths requirement of Article 10, Section 8 of the Constitution of West Virginia and Sections 4 and 14 of Chapter 13, Article 1 of the Code of West Virginia being unconstitutional and invalid and thus of no force and effect, and a majority having voted in favor of the issuance of the bonds at the special election held on April 29, 1968, the Board had a mandatory duty to proceed forthwith, by resolution, to authorize the issuance of the bonds and to take necessary steps as provided in Code 13-1 for their sale and delivery and the application of the proceeds thereof to the purposes of the bonds, and tendered to the Board their petition requesting and demanding that the Board take such action. A copy of plaintiff's petition is attached to and made a part of this complaint marked "Exhibit G". The Board, although ready, willing and able to proceed with the issuance, sale and delivery of the bonds and to comply with all provisions of Article 10 of the Constitution of West Virginia and Chapter 13 Article 1 of the Code of West Virginia, refused plaintiff's petition on the ground that it was prohibited from proceeding further by the three-fifths requirement of Article 10, Section 8 of the Constitution of West Virginia and Sections 4 and 14 of Chapter 13, Article 1 of the Code of West Virginia. A copy of the resolution adopted by the Board denying plaintiff's petition as recorded in the minutes of the meeting of the Board of March 27, 1968, is attached and made a part of this complaint marked "Exhibit H".

Institution of proceedings to secure an amendment

to the Constitution to delete the three-fifths requirement is not practical or feasible because of the necessity of securing two-thirds vote of the members elected to each House of the Legislature to submit such an amendment to the vote of the people or to go through the time-consuming and virtually impossible process of amendment through a constitutional convention. Any such constitutional amendment could only operate prospectively and would be ineffective to cure the arbitrary and discriminatory effect of the three-fifths requirement upon the special bond election which is the subject matter of the proceeding. Plaintiffs therefore have no remedy available to them save those open to them in the courts of this state and of the United States, and without judicial intervention, they will be saddled with the arbitrary and discriminatory three-fifths requirement and prevented from undertaking the improvements necessary to meet the educational requirements of Roane County and desired by a majority of its citizens.

9. An actual controversy exists between the parties involving the validity of the three-fifths requirement of Article 10, Section 8 of the Constitution of West Virginia and Sections 4 and 14 of Chapter 13, Article 1, of the Code of West Virginia. Plaintiffs contend that the three-fifths requirement is unconstitutional and invalid and of no force and effect in that: (1) it denies to plaintiffs and others similarly situated the equal protection of the laws accorded them by the Fourteenth Amendment to the Constitution of the United States by virtue of the debasement of their votes; and (2) it denies to plaintiffs and others similarly situated a Republican Form of Government Guaranteed unto to every State by the United States in Article 4 Section 4 of the Constitution of the United States.

Plaintiffs further contend that, a majority of all the votes cast for and against the proposition submitted by the Board at the special bond election held on April 29, 1968 having been cast in favor of the same, the Board pursuant to Section 14, of Chapter 13, Article 1 of the Code of West Virginia, has the mandatory duty, by resolution, to authorize the issuance of such bonds as provided in the Board's order of March 27, 1968, and to proceed forthwith to take all necessary steps as provided in Chapter 13, Article 1 for the sale and delivery of the bonds and the application of the proceeds thereof to the purposes set forth in its Order of March 27, 1968.

10. Plaintiffs further represent that a settlement of the controversy between the parties is of great urgency, requiring speedy determination. Unless a decision as to the validity of the three-fifths requirement of Article 10, Section 8 of the Constitution of West Virginia and Sections 4 and 14 of Chapter 13, Article 1 of the Code of West Virginia is obtained as expeditiously as possible, bonds issued under the authority of the election held on April 29, 1968, may be questioned because of the time elapsing between the date of the vote and the issuance of the bonds, and the will of the majority of the citizens of Roane County may again be thwarted and subjected to the control of the minority despite the invalidity of the three-fifths requirement. Any further delay in making the improvements to the educational facilities of Roane County proposed in the bond election will force the Board to secure alternate facilities in place of those whose use is prohibited to them and which are inadequate for present needs, all at great cost and loss to plaintiffs and all other residents and taxpayers of Roane County.

WHEREFORE plaintiffs respectfully pray that: (1)

This Court consider and determine the question of the validity of the three-fifths requirement of Article 10, Section 8 of the Constitution of West Virginia and Sections 4 and 14 of Chapter 13, Article 1 of the Code of West Virginia, and rights and interests of Plaintiffs and other persons similarly situated thereunder; (2) This Court find that the three-fifths requirement is unconstitutional and void and does not limit the authority of the Board to incur debt and issue bonds otherwise lawful under the provisions of Article 10, Section 8 of the Constitution of West Virginia and Chapter 13, Article 1 of the Code of West Virginia; (3) That this Court order the Board to proceed forthwith, by resolution, to authorize the issuance of $1,830,000 bonds in accordance with its order of March 27, 1968 and to take all steps necessary under the provisions of Chapter 13, Article 1 of the Code of West Virginia for their sale and the application of the proceeds thereof to the purposes set forth in said order; and (4) This Court make such other and further determinations and declarations and accord the plaintiffs such further relief as in the premises may seem necessary or proper.

GRANVILLE H. LANCE
FRED HILL
CHESTER C. DODD, JR.
BRADY D. HICKEL, JR.
JOE A. CRADDOCK, plaintiffs
BY COUNSEL

Lively and Francis
BY J. HENRY FRANCIS, JR.
A member of the firm
603 Virginia Street East
Charleston, West Virginia
Attorney for Plaintiffs

APPENDIX 2B

Defendants' Motion to Dismiss and Motion For Judgment on the Pleadings

IN THE CIRCUIT COURT OF ROANE COUNTY, WEST VIRGINIA:
GRANVILLE H. LANCE et als,
Plaintiffs,
vs. Civil Action No. 1062
THE BOARD OF EDUCATION OF THE COUNTY OF ROANE, a *Corporation,* et als,
Defendants.

Motion to Dismiss and Motion for Judgment on the Pleadings

MOTION TO DISMISS

Come now defendants John W. Stone, Charles Elba Robinson, H. D. Jones, Benjamin Hickel and John N. Cottle, members of the Board of Education of the County of Roane, and Mirrell Clark, Superintendant of Schools of Roane County, West Virginia, and respectfully move the Court to dismiss the said defendants and each of them from the above-styled civil action with their costs for the reason that the claim therein asserted is of a nature that it can be sought only against the Board of Education of the County of Roane, a governmental corporation, and not against these defendants either as individuals or as public officials or otherwise as members of said Board and Superintendant as aforesaid.

WHEREFORE, said defendants Stone, Robinson, Jones, Hickel, Cottle and Clark respectfully move the Court to dismiss them and each of them from this action with their costs.

MOTION FOR JUDGMENT ON THE PLEADINGS

Come now the defendants to the above-styled civil action and, pursuant to the provisions of Rule 12(c), West Virginia Rules of Civil Procedure, respectfully move the Court to grant the said defendants judgment on the pleadings upon all the relief prayed for in plaintiffs' Complaint and grant item number one (1) of relief prayed for therein and deny all other relief prayed for therein and dismiss these defendants from this action with their costs in this behalf expended.

Defendants' said motion is made and grounded upon the things and matters following:

1. The provisions of the West Virginia Constitution and the West Virginia Code cited and complained of by plaintiffs requiring approval of three-fifths of the persons voting thereon for passage are valid and constitutional and in complete harmony with the Constitution of the United States of America and all Amendments thereto.

2. The said state constitutional and statutory provisions are not repugnant to any relevant majoritarian principle of republican government.

3. No question concerning the election of representatives to serve in public bodies or of delegates to any convention or legislative body or public board or commission or other agency is involved in this case.

4. No question of governmental control out of proportion to the relative population of two or more political subdivisions or political districts is involved in this case.

5. Only a question of altering the existing property tax structure, levying of additional assessment and taxes, assumption of public bonded indebtedness, and disposition of the additional revenues derived therefrom is in-

volved in an examination of the election process in this case.

6. Inherent in the framework of constitutional government under the United States Constitution and the West Virginia Constitution is the concept that in determining basic issues of sweeping importance to the constituted authority, such as fiscal matters, a number of rates substantially greater than a simple majority thereof, may be required for passage.

7. Constitutional government itself is a harmonious blending of the principle of majority rule with the safeguarding of minority rights and interests.

8. The question presented to the voters in the election alleged in the Complaint involved assessment and taxation of real and personal property. There was no requirement that one own property of a certain value, or that he own any property in order to vote at this election. Therefore, one with inconsequential property in said Roane County cast a ballot of the same strength and influence as that of one with extensive property holdings upon an issue which, if approved, would cost the former nothing and the latter a considerable sum. Further, the direct benefit to be derived by each from passage of the program would bear no relationship whatever with the relative increase in assessment and taxation of the property of each.

9. If it be established, as plaintiffs allege, that the said sixty-per cent rule limits or hinders progress, defendants respectfully submit that it is for the Legislature and the people of West Virginia, by amendment or by convention and approval, to revise the appropriate provisions, not for this or any Court to dismiss the provision out of hand upon the convenient premise of unconstitutionality.

10. All the allegations contained in plaintiffs' Complaint establish clearly that defendants' course of action complained of was eminently correct and was the only proper and legal course of action under all the attending circumstances as therein alleged. The allegations in said Complaint establish that plaintiffs have no claim against defendants or any of them upon which relief can be granted.

There being no issue of fact joined in the pleadings necessary or relevant, to a determination of this action, defendants submit no supporting affidavits of outside matters.

WHEREFORE, defendants respectfully move the Court for judgment on the pleadings as aforesaid.

THE BOARD OF EDUCATION OF THE COUNTY OF ROANE, A Corporation, JOHN N. STONE, CHARLES ELBA ROBINSON, H. D. JONES, BENJAMIN HICKEL, and JOHN N. COTTLE, Members of the Board of Education of the County of Roane, and MIRRELL CLARK, Superintendant of Schools of Roane County, West Virginia,
Defendants.

By Counsel

ORTON A. JONES
Prosecuting Attorney of
Roane County, West Virginia
Post Office Box No. 16
Roane County Courthouse
Spencer, West Virginia
Counsel for Defendants

APPENDIX 3

OPINION OF THE WEST VIRGINIA SUPREME COURT OF APPEALS

GRANVILLE H. LANCE *et al*

v.

THE BOARD OF EDUCATION OF COUNTY OF ROANE, ETC., JOHN W. STONE, *et al.*, MEMBERS, AND MIRRELL CLARK, Superintendent of Schools of Roane County, West Virginia.

No. 12809.

SUPREME COURT OF APPEALS OF WEST VIRGINIA.

Submitted May 7, 1969.

Decided July 8, 1969.

Dissenting Opinion July 31, 1969.

On Rehearing Nov. 11, 1969.

Further Rehearing Denied Dec. 2, 1969.

Syllabus by the Court

1. In a civil action in which the plaintiffs allege that the weight and force of their votes in a public election, and the votes of other persons similarly situated, are debased or diluted when considered in relation to the votes of other persons voting in such election, in violation of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States, there is thereby presented a justiciable issue, cognizable by the courts, upon which the plaintiffs are entitled to a judicial decision.

2. The Constitution of the United States, and the treaties and laws of the United States made in pursuance thereof, constitute the supreme law of the land

and the judges in every state are bound thereby. When a provision of the Constitution of West Virginia or of a statute enacted by the Legislature of this state is contrary to and in violation of a provision of the Constitution of the United States, the latter provision must be regarded as paramount and must prevail; and in a case properly presenting such a conflict, it is the right and duty of this Court to declare the provisions of the state statute or the provision of the state constitution to be unconstitutional and unenforceable.

3. The three-fifths vote requirement of Article X, Section 8 of the Constitution of West Virginia and of Sections 4 and 14 of Article 1, Chapter 13, Code, 1931, as amended, and the sixty percent vote requirement of Article X, Section 1 of the Constitution of West Virginia and of Section 16 of Article 8, Chapter 11, Code, 1931, as amended, are in conflict with and violative of the Equal Protection Clause of the Constitution of the United States and are therefore unconstitutional and unenforceable.

Lively & Francis, J. Henry Francis, Jr., Charleston, McClintic, James, Wise & Robinson, Charles C. Wise, Jr., Charleston, for appellants.

Jackson, Kelly, Holt & O'Farrell, William T. O'Farrell, Charleston, George M. Scott, Spencer, for intervenors as parties defendant.

CALHOUN, Judge:

This case, on appeal from a final judgment of the Circuit Court of Roane County, involves two declaratory judgment actions instituted in that court pursuant to Article 13, Chapter 55, Code, 1931, as amended, and

Rule 57 of the Rules of Civil Procedure, by Granville H. Lance, Fred Hill, Chester C. Dodd, Jr., Brady D. Hickel, Jr., and Joe A. Craddock, as plaintiffs, against the Board of Education of Roane County, a corporation, the individual members of that body and Mirrell Clark, Superintendent of Schools of Roane County, West Virginia, as defendants. Inasmuch as the two actions involve identical parties plaintiff, identical parties defendant, and similar or identical legal questions, they were consolidated in the trial court for hearing and for decision. In this Court, for the sake of brevity and clarity, the parties will be referred to as plaintiffs and as defendants in accordance with their designation in the civil actions in the trial court.

In one action, the plaintiffs challenge the validity of the three-fifths vote requirement of Article X, Section 8 of the Constitution of West Virginia and Sections 4 and 14 of Article 1, Chapter 13, Code, 1931, as amended, dealing with elections held by political subdivisions of the state for determination whether bond indebtedness shall be incurred. In the other action, the plaintiffs challenge the validity of the sixty percent vote requirement provided by Article X, Section 1 of the Constitution of West Virginia, commonly referred to as the Tax Limitation Amendment, relating to elections to authorize local tax levying bodies to make additional levies for tax purposes in excess of the levies provided for in the Tax Limitation Amendment.

The plaintiffs contend that the constitutional and statutory provisions in question are invalid and unenforceable on the ground that they are in contravention of the Equal Protection Clause of the Fourteenth Amendment and the Guaranty Clause of Article IV, Section 4 of the Constitution of the United States.

By an order entered in the consolidated actions on November 22, 1968, the trial court sustained the defendants' motions for judgment on the pleadings made pursuant to Rule 12(c) of the Rules of Civil Procedure; held that the West Virginia constitutional and statutory provisions in question are constitutionally valid and enforceable; and directed that the complaints be dismissed and that the consolidated actions be stricken from the docket. From the final judgment of the trial court, the plaintiffs have been granted the appeal to this Court. After the appeal was granted, this Court granted to the plaintiffs leave to move to reverse the judgment of the trial court pursuant to Code, 1931, 58-5-25 and Rule IX of the Rules of this Court. In these circumstances, the case was submitted for decision by this Court upon the original record, upon typewritten briefs and upon oral argument of counsel.

The defendants, particularly the board of education, at a special election held on April 29, 1968, submitted to the voters of Roane County the question of issuing bonds in the amount of $1,830,000 for the purpose of alleviating the overcrowded condition of school classrooms and facilities, removing fire hazards, providing for more adequate and more modern vocational and educational facilities, and for the purpose of meeting the needs of disadvantaged children. At the same special election, there was submitted to the voters of the county a proposal for the laying of additional tax levies in excess of the regular authorized levies for a period of five years, a part of the proposed additional revenue to be used for current expenditures and a part for capital improvements. A canvass of the votes revealed that 2,887 or 51.55% of the total votes cast favored the issuance of

the bonds and 2,866 or 51.51% of the total votes cast were in favor of the additional levy.

Subsequently the plaintiffs appeared before the board of education in their own behalf and in behalf of other persons who had voted with the majority on the two issues and demanded that the board authorize the laying of the additional tax levies and the issuance and sale of the proposed bonds on the ground that the sixty percent vote requirements in the constitution and the statutes were invalid in that they denied to the plaintiffs and others similarly situated the equal protection of the laws guaranteed to them by the Fourteenth Amendment and the republican form of government guaranteed to every state by Article IV, Section 4 of the Constitution of the United States.

Upon the refusal of the board to grant these requests or demands, the plaintiffs instituted the two declaratory judgment actions in the Circuit Court of Roane County by which they requested that the court declare the sixty percent vote requirements in question to be unconstitutional and void; and, by way of affirmative relief, the plaintiffs prayed in one action that the court require the board of education to proceed to authorize the issuance of the proposed bonds, to take all necessary steps in accordance with law to effectuate the sale of the bonds, and to provide for the application of the proceeds of the sale thereof, in accordance with the board's original proposal submitted to the voters at the special election; and similarly, in the other action, the plaintiffs prayed that the board of education be required to proceed according to law to impose the additional levy in accordance with the expressed will of the majority of the voters who voted upon that issue at the special election.

An answer was filed to the complaint in each of the two actions but, we believe, they raise no material issue of fact. A decision of the case involves primarily the legal question whether the West Virginia constitutional and statutory provisions in question are in contravention of the Constitution of the United States and are therefore void and unenforceable; and also the question whether the case presents a justiciable controversy.

Article VI of the Constitution of the United States contains the following language: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Article I, Section 1 of the Constitution of West Virginia provides: "The State of West Virginia is, and shall remain, one of the United States of America. The Constitution of the United States of America, and the laws and treaties made in pursuance thereof, shall be the supreme law of the land." By that clear and unambiguous language of the constitution of this state, it is expressly recognized that if there be an inconsistency or conflict between a provision of the constitution of this state and a provision of the Constitution of the United States, the latter must be regarded as paramount, must prevail, and the former must yield. In Carrington v. Rash, 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed.2d 675, the Court held that a provision of the Constitution of the State of Texas was in conflict with the Equal Protection Clause of the Fourteenth Amendment and that the provision of the state constitution was therefore unconstitutional and invalid. Reynolds v. Sims, 377 U.S.

533, 84 S.Ct. 1362, 1393, 12 L.Ed.2d 506, 584, contains the following language: "When there is an unavoidable conflict between the Federal and a State Constitution, the Supremacy Clause of course controls." See also State ex rel. Witt v. State Canvassing Board, 78 N.M. 682, 437 P.2d 143. We consider it unquestionable that if a provision of the Constitution of West Virginia is in conflict or inconsistent with one or more provisions of the Constitution of the United States, it is both the right and duty of this Court, when such a case is presented, to declare the provision of the state constitution to be invalid and unenforceable.

It is not questioned that the declaratory judgment actions were proper proceedings by which to require a judicial declaration of the rights of the parties in relation to the controversy in this case. This case presents an actual controversy and one which is justiciable within the intent and purpose of the declaratory judgment laws of this state. In a number of cases, this Court has held that the constitutionality of a legislative enactment may be determined in a civil action instituted pursuant to the statute and court rules of this state pertaining to declaratory judgments. Nuckols v. Athey, 149 W.Va. 40, pt. 2 syl. 138 S.E.2d 344.

In the present case, the plaintiffs assert that the effect of the sixty percent vote requirements in question is to debase or dilute the weight or force of an affirmative vote when considered in relation to the weight or force of a negative vote. More specifically, the plaintiffs contend that a negative vote has one and one-half the force of an affirmative vote and that, therefore, two negative votes have the force of three affirmative votes. Article 2, Section 4 of the Constitution of West Virginia provides: "Every citizen shall be entitled to equal repre-

sentation in the government, * * *." In referring to and applying that constitutional provision, the Court made the following statement in State ex rel Smith v. Gore, 150 W.Va. 71, 75, 143 S.E.2d 791, 794: "That constitutional provision is clear and unambiguous in its meaning. It provides that every citizen shall have equal representation in government." The provision of our state constitution quoted immediately above is similar in its purpose to that of the Equal Protection provision of the Constitution of the United States. The West Virginia constitutional and statutory provisions for the holding of elections by which voters may determine whether bonds shall be issued and whether extra levies of taxes shall be made represent some of the very few instances in which the individual voter is permitted to have a direct and wholly effective voice in government. The two issues submitted to the will of the voters in the special election in Roane County involve the question whether taxes shall be collected to meet the extra levies and to retire the bonds. The voters were thereby also permitted to voice their sentiments and their views on the question of improved public schools and public school facilities for the county as a basic aspect of government.

As we have stated previously, the plaintiffs, speaking in behalf of themselves and all other voters who voted with the majority in the special election, assert that, by the debasement and dilution of their affirmative votes when considered in relation to the negative votes, they have been denied their rights under the Equal Protection provision of the Fourteenth Amendment of the Constitution of the United States. It is now clear, we believe, that such an assertion presents a justiciable question, cognizable by the courts, and not a mere political question.

Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663, involved a declaratory judgment proceeding instituted in a United States District Court in Tennessee by certain voters qualified to vote for members of the General Assembly of Tennessee, in their own behalf and in behalf of other voters similarly situated, alleging that, by reason of a certain Tennessee statute, seats in the general assembly were arbitrarily and capriciously apportioned in such a manner as to dilute or debase the votes of the complaining voters, thereby denying to them their constitutional rights to equal protection of the laws under the Fourteenth Amendment. The Court held that the allegations of the denial of equal protection of the law, in the circumstances of the case, presented a justiciable cause of action upon which the complaining voters were entitled to a trial and a judicial decision. In the concluding portion of the opinion, the Court stated: "We conclude that the complaint's allegations of a denial of equal protection present a justiciable constitutional cause of action upon which appellants are entitled to a trial and a decision. The right asserted is within the reach of judicial protection under the Fourteenth Amendment." The decision of the Court in this respect has been adhered to and reaffirmed in subsequent cases including Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 and Wesberry v. Sanders, 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed. 2d 481. See also Armentrout v. Schooler, 409 S.W.2d 138 (Mo.1966).

In relation to the problems existing in Roane County in connection with the public school system, the plaintiffs have made the following allegations in their complaints:

> "There have been no new schools or major additions or improvements to existing schools in Roane County since 1946 when the voters authorized the

issuance of $5,000,000 bonds for such purpose. Since that time only minor improvements have been made to existing facilities, the outlays for such improvements averaging less than 4% of the annual budget for current expenditures. As a consequence the schools in the county have become old and inadequate for modern educational needs. There are an average of 31.2 pupils per elementary classroom and 25.5 pupils per secondary classroom in 1966-1967 compared with the state average of 28 pupils per elementary classroom and 23.6 pupils per secondary classroom. Many of the classrooms and other facilities are makeshift in nature resulting from efforts to adapt old facilities to existing needs. Dangerous conditions have been created by the deterioration of many of the school structures. At least two major schools within the county, Spencer Elementary School and Spencer High School, have serious fire hazards which have resulted in orders from the State Fire Marshall and the State Superintendent of Schools closing certain parts of the facilities, prohibiting their further use until the conditions have been corrected and eliminated."

The plaintiffs further allege in their complaints that during the years 1964 to 1968, inclusive, six proposals of excess levies or bond issues for public school purposes have been submitted by the county board of education for approval of the voters of Roane County at elections held for that purpose and that in all instances the proposals received majorities of affirmative votes, which majorities ranged from 51.51% to 55.84%, but that in each instance the proposal was rejected because of a failure of the proposal to receive affirmative votes totaling at least sixty percent of the total number of votes cast. It is manifest, therefore, that there exists in this connection in Roane County a genuine controversy between the plaintiffs and the defendants and that it

is a controversy of quite considerable magnitude and importance.

Pertinent cases which followed Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663, developed the "one person, one vote" concept. This concept was enunciated in Gray v. Sanders, 372 U.S. 368, 83 S.Ct. 801, 9 L.Ed.2d 821. In the *Gray* case, the Court held that the Georgia county unit system was unconstitutional. The case involved a declaratory judgment proceeding instituted to determine the validity of the county unit system as a method of nominating candidates for statewide offices and for United States Senators in Democratic primary elections. The *Gray* case is strictly a "voting" case; it has nothing to do with reapportionment, redistricting, or the composition of State or federal legislatures. The Court held that the system impaired the right to vote of certain citizens and, therefore, denied those citizens the equal protection of the law guaranteed by the Fourteenth Amendment. In the *Gray* opinion the Court stated (372 U.S. at 380-381, 83 S.Ct. at 808-809):

> *"The only weighting of votes sanctioned by the Constitution* concerns matters of representation, such as the allocation of Senators irrespective of population and the use of the electoral college in the choice of a President. * * *. *But once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded.*
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> *The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote."* (Italics supplied.)

The next case in point was Wesberry v. Sanders, 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481. This case involved the apportionment of congressional districts in Georgia. The appellants claimed debasement and dilution of their rights to vote because of the state's existing apportionment system and because of the failure of the state legislature to realign the state's congressional districts more nearly to equalize the population of each district. The Court held that an apportionment of congressional seats which "contracts the value of some votes and expands that of others" was unconstitutional. The Court, in applying the principles of the earlier *Gray* case, concluded that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." (376 U.S. at 8, 84 S.Ct. at 530).

With the *Baker, Gray,* and *Wesberry* cases as precedents, the Court, in Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506, considered the question whether the existing apportionment system of the Alabama State Legislature was valid despite the fact that it was not apportioned on a population basis. The Court there held that there was a federal constitutional requirement that state legislatures be apportioned on a population basis.

The plaintiffs' position in this case is based upon the impairment of their rights to vote which are personal and individual rights. We believe that the following language from the *Reynolds* case (377 U.S. at 555, 84 S.Ct. at 1378) has a significant bearing on the legal questions raised in the present case: "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. *And*

the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." (Italics supplied.)

In a recent decision, Kramer v. Union Free School District No. 15, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583, announced June 16, 1969, the Court held a provision of the New York Education Law to be unconstitutional because it excluded from the electorate in school district elections certain voters who were otherwise eligible to vote in state and federal elections. The Court quoted with approval the following language from Harper v. Virginia Board of Elections, 383 U.S. 663, 655, 86 S.Ct. 1079, 1081, 16 L.Ed.2d 169: "once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."

It is true that the "one person, one vote" principle has been applied by the Supreme Court of the United States primarily in reapportionment cases which involved the rights of voters to vote in elections for nomination or election of public officials. However, the "one person, one vote" principle has been stated in general terms and without qualification under the Equal Protection Clause. The application of that general principle has not, to our knowledge, been denied in any other area of voting in public elections.

Cipriano v. City of Houma, 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647, announced June 16, 1969, dealt with a Louisiana statute, enacted pursuant to a provision of the constitution of that state. The statute authorized elections to be held by municipalities for the purpose of permitting the voters to vote on the question of the issuance

of municipal bonds. The statute provided that bonds could be issued by a municipality only if approved by a majority in number and amount of "the property taxpayers qualified to vote". It was held in that case, in accordance with Kramer v. Union Free School District No. 15, *supra*, announced the same day, that the restriction of the right to vote to "the property taxpayers qualified to vote" violated the Equal Protection Clause of the Fourteenth Amendment and that, in this respect, the statute was unconstitutional and invalid. We deem this decision in point because it dealt with a local election and the rights of voters in an election dealing with the issuance of municipal bonds as distinguished from an election to nominate or elect public officials.

State ex rel. Witt v. State Canvassing Board, 78 N.M. 682, 437 P.2d 143, a 1968 case, involved the validity of a provision of the state constitution which required that any amendment of the constitution proposed by the legislature be ratified by "a vote of the people of this state in an election at which at least three-fourths of the electors voting in the whole state, and at least two-thirds of those voting in each county in the state, shall vote for such amendment." The proposed amendment which was submitted to the voters at the election in question received a percentage of 81.1851 favorable votes on a statewide basis. In one county, however, fewer than a majority of the voters favored the proposal and, in twelve counties, fewer than two-thirds of the voters approved it. As a consequence, a minority of the voters of the state who resided in the thirteen counties in which the proposed amendment did not receive two-thirds approval prevailed over the expressed will of more than eighty-one percent of the voters on a statewide basis. That case is analogous to the present case in that it did not relate to the right

to vote for representatives in government but rather to the right of the voter at an election involving an issue directly related to government. The Supreme Court of New Mexico, relying upon the "one person, one vote" principle, held that this legal principle, established pursuant to the Equal Protection Clause, could not in reason and logic be restricted to the mere right to vote for representatives in government, and declared to be invalid the constitutional requirement of a two-thirds favorable vote in each county of the state. Having done so, the court did not consider the validity of the requirement of a favorable vote by at least three-fourths of the persons voting on a statewide basis. That issue was moot for the reason that the proposal received more than eighty-one percent of favorable votes on a statewide basis. In that case the court stated (437 P.2d at 149):

> "We see no escape from the conclusion that a requirement of a two-thirds favorable vote in every county, when there is a wide disparity in population among counties, must result in *greatly disproportionate values to votes* in the different counties. Where, as here, a vote in Harding County outweighs a hundred votes in Bernalillo County, the 'one person, one vote' concept announced in Gray v. Sanders, supra, certainly is not met." (Italics supplied.)

It is asserted by counsel for the defendants that the Constitution of the United States contains many provisions which are repugnant to the idea of majority rule, including a provision that ratification of treaties requires a concurrence of two-thirds of the senators present and voting, requirements pertaining to amendment of the Constitution, and provisions relating to overriding a veto of a bill by the president. We consider this contention frivolous and wholly beside the point. First, it could not

reasonably be contended that a provision contained in the Constitution is violative thereof. See Gray v. Sanders, 372 U.S. 368, 378, 83 S.Ct. 801, 9 L.Ed.2d 821. Second, we have concerned ourselves in this opinion only with the Equal Protection Clause which provides that no state shall "deny to any person" the equal protection of the laws. This constitutional provision imposes an inhibition upon each state for the protection of "any person" as an individual. It is an individual, personal right which is thus vouchsafed to "any person".

It is contended in behalf of the defendants that the Equal Protection Clause and the "one person, one vote" principle are not in point because this case merely involves the right of a state to require a sixty percent affirmative vote in elections which submit to the voters the issue of issuance of bonds or the issue of laying an excess levy for public school purposes. This, we believe, amounts to "arguing in circles" or an argument by circumlocution. It is a contention which begs the question. Its basis seems to be that this is an area in which the Equal Protection Clause cannot be binding upon the states. It is our view that we must first determine whether the sixty percent vote requirements violate the Equal Protection Clause and that, upon that basis, we must determine whether the state has the power to require the sixty percent affirmative vote.

We are of the opinion that the "one person, one vote" principle is now firmly established in broad general terms without qualification or exception. Certainly the right of the voter to equal protection, the right to protection against the dilution or debasement of the weight or force of an individual's vote, is fully as sound, sacred and important when he is voting on issues involving taxation,

public revenue and the promotion of an adequate public school system, as when he is voting for the nomination or election of a constable, a state senator, a governor or any other public official to represent the voter in government.

We are unwilling to concede that a determination of issues such as those involved in this case cannot be safely entrusted to a majority of the voters. There was no legal principle of which we are aware which required that the Constitution of West Virginia extend the right of the voter to express his will at the polls in the areas involved in the Roane County election in question in this case. The fact remains that our state constitution has extended the right of the voter into these areas; and when the voter was constitutionally granted the right to vote on these important issues, he thereby became guaranteed the equal protection of the law under the Fourteenth Amendment and the constitutional right to have his vote accorded the same weight, effect and force as that of any other person's vote, and thereby he became protected by the constitutional right to have the weight, force and effect of his vote not debased or diluted when considered in relation to the vote of any other person.

If the right of a voter can be legally diluted or debased by the sixty percent requirement, it would seem to follow necessarily that it could be further diluted or debased legally by a seventy-five or a ninety percent requirement. In other words, if the weight and force of a person's vote can be debased and diluted in accordance with the contention of the defendants in this case, we see no escape from the conclusion that the weight and force of such a vote may legally be debased and diluted virtually to the point of total extinction.

For reasons stated in this opinion, we are of the opinion, and accordingly the Court holds, that the three-fifths vote requirement of Article X, Section 8 of the Constitution of West Virginia and Sections 4 and 14 of Article 1, Chapter 13, Code, 1931, as amended, and also the sixty percent requirement of Article X, Section 1 of the Constitution of West Virginia and Section 16 of Article 8, Chapter 11, Code, 1931, as amended, are in conflict with and violative of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States and that, therefore, such provisions are void and unenforceable. In these circumstances, it is unnecessary for us to decide whether the sixty percent vote requirements in question are violative of the Guaranty Clause of Article IV, Section 4, of the Constitution of the United States.

The motion of the plaintiffs to reverse the judgment of the Circuit Court of Roane County is granted, the judgment is therefore reversed and the case is remanded to that court for such further proceedings as may be proper and consistent with the decision of the Court embodied in this opinion.

Motion to reverse granted.

HAYMOND, President (dissenting):

I am amazed, shocked and deeply distressed at the unprecedented and constitutionally unauthorized decision of the majority of this Court in this proceeding by which it undertakes to invalidate certain statutory provisions and two provisions of Sections 1 and 8, Article X of the Constitution of this State. By my oath of office as a Judge of this Court, which I consider binding in conscience, I swore to support, not to invalidate, the Constitution of

this State and, with all the sincerity at my command and upon grounds and for reasons to be stated in this dissent, I dissent from the decision of the majority. It should be clearly understood that in expressing my dissentient views, however, in this honest and sincere disagreement between my associates and me, my criticisms are directed, not to them, but to their decision.

With respect to the sanctity of an official oath to support a Constitution, the great Chief Justice, John Marshall, in the landmark case of Marbury v. Madison, 5 U.S. (1 Cranch) 137, at page 178, 2 L.Ed. 60, used this language: "Why otherwise does it [the United States Constitution] direct the judges to take an oath to support it? This oath certainly applies in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments and the knowing instruments, for violating what they swear to support!" Though these remarks were directed to the oath to support the Constitution of the United States they are applicable to an oath to support the Constitution of this State.

The Constitution of West Virginia is the fundamental, organic law of this State. It was made by the sovereign people of West Virginia and by them alone; and only the people of West Virginia, not this Court, can unmake that Constitution. It, and it alone, creates, maintains and preserves this State as a sovereign governmental entity and without it, intact and unimpaired in all its parts, this State can not exist or function as a sovereign governmental entity. All the departments and offices of the State Government of West Virginia, including its executive, its legislative and its judicial branches, are created by that Constitution and the power and the authority, in

their entirety, which any of them possesses are derived solely from that Constitution and from no other source. That Constitution is equally binding on all the political subdivisions of the State and upon its courts, and every officer and every citizen within its territorial limits.

To say that this Court, the creature of the Constitution from which it derives all the power and the authority which it possesses, may invalidate that Constitution or any of its provisions, is incredible beyond my power of belief and any such utterance does not make sense to me.

That this Court is without authority to invalidate the Constitution of this State or any of its provisions is clear to me beyond question. Manifestly it derives no such power from the Constitution of this State or from any agency of the Federal Government. On the contrary, such power is denied it by express provisions of the Constitution. The people of this State, and they alone, possess that power to the exclusion of all governmental instrumentalities of the State.

Article IV, Section 5 of the Constitution of this State provides that every person elected or appointed to any office, before proceeding to exercise the authority or to discharge the duties of such office shall make oath or affirmation that he will support the Constitution of the United States and the Constitution of this State, and that he will faithfully discharge the duties of the office to the best of his skill and judgment. Under that provision any vote or act of any officer of this State, including all its judges, which operates to invalidate the Constitution or any of its provisions is ineffective and of no force or effect.

That no judge or other officer of this State can act as such in any manner to invalidate or nullify, change or

amend any provision of the Constitution of this State is manifest by Sections 1 and 2, Article XIV of the Constitution by which the people reserve to themselves the exclusive right and power to alter or amend the Constitution and provide the manner in which any alteration or amendment shall be made. Those methods, which are exclusive, are ratification by a majority vote of the people of this State, at an election for the purpose, of acts or ordinances of a Constitutional Convention created in the manner provided by the Constitution and submitted to the people, and ratification by a majority vote of the people of this State, at an election for the purpose, of any amendment proposed by the Legislature. The action of the majority in undertaking to invalidate the constitutional provisions here under consideration is contrary to and violative of the constitutional provisions to which I have referred, and all such action is null and void and of no force or effect for that reason alone.

That this Court is without authority to invalidate any provision of the Constitution of this State is also indicated by the historical record that no judge of this Court in any of the more than 13,000 cases that have been decided by it during the period of 106 years of its existence has ever voted or acted to invalidate any provision of the Constitution of this State; and until the present decision in this case none of the total number of fifty judges of this Court during its entire period of existence has ever engaged in or taken such action.

To the contrary, this Court in its prior decisions has uniformly held that this Court does not have the power to amend, alter or repeal any provision of the Constitution of this State and that the provisions of that Constitution are binding upon all departments of government of

this State, all its citizens, and all persons whomsoever within its jurisdiction.

In the recent case of State ex rel. Smith v. Gore, 150 W.Va. 71, 143 S.E.2d 791, decided in 1965, an apportionment case, in which this Court unanimously and correctly held that representatives to a Constitutional Convention must be selected by voters on an equal population basis, the opinion written by Judge Caplan says: "A constitution is the fundamental law by which all people of the state are governed. It is the very genesis of government. Unlike ordinary legislation, a constitution is enacted by the people themselves in their sovereign capacity and is therefore the paramount law. This basic organic law can be altered or rewritten only in the manner provided for therein. Under the provisions of Article XIV of the West Virginia Constitution this can be accomplished by the legislature or by a convention. * * *. Each may formulate and present for a vote of the people proposed alterations of the constitution. In either case, until the people act such proposals have no force or effect of law."

In Re: Assessment of Shares of Stock of Kanawha Valley Bank, 144 W.Va. 346, 109 S.E.2d 649, the opinion prepared by Judge Browning, contains these pertinent statements: "This Court does not have the power to amend, alter, or repeal any provision of the Constitution of this State. That is a prerogative that the people have reserved unto themselves alone. It is within our power though, and our paramount duty, to prevent others from amending or repealing any part of the organic law of this State except in the manner provided in the document itself."

In Harbert v. County Court of Harrison County, 129 W.Va. 54, 39 S.E.2d 177, this Court, in a unanimous

opinion written by me said "The Constitution of this State is the supreme law of West Virginia; it is subject only to the Constitution of the United States and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made, under the authority of the United States, all of which constitute the supreme law of the land. United States Constitution, Article VI, Clause 2. The Constitution of West Virginia is binding upon all the departments of government of this State, all its officers, all its agencies, all its citizens, and all persons whomsoever within its jurisdiction. The three branches of our government, the legislative, the executive, and the judiciary, alike derive their existence from it; and all of them must exercise their power and authority under the Constitution solely and strictly in accordance with the will of the sovereign, the people of West Virginia, as expressed in that basic law. It is the solemn duty of this Court, its creature, to obey and give full force and effect to all its terms and provisions."

The majority has evidently overlooked or purposely ignored the quotations in the three above cited cases for it does not overrule or even mention any of them in its opinion in this case.

In the early case of List v. City of Wheeling, 7 W.Va. 501, in which Section 8, Article X of the Constitution of this State, one of the provisions here under consideration, was recognized and considered, this Court, in the opinion delivered by Alpheus F. Haymond, President, who was my grandfather and who had been a member of the Constitutional Convention of 1872, used this language: "The Constitution is the fundamental law of the state, in opposition to which any other law must be inoperative and

void." Of course, in that case the constitutional provision now under attack was without question recognized and considered to be valid, and its validity has been recognized in many subsequent decisions of this Court. See Berry v. Fox, 114 W.Va. 513, 172 S.E. 896; Bee v. City of Huntington, 114 W.Va. 40, 171 S.E. 539; Finlayson v. City of Shinnston, 113 W.Va. 434, 168 S.E. 479; Herold v. Townsend, 113 W.Va. 319, 169 S.E. 74.

In the *Berry* case, in which Article X, Section 1, of the Constitution of this State, known as the Tax Limitation Amendment of 1932, was considered by this Court, the majority opinion written by Judge Maxwell, states:

"The underlying purpose of written constitutions is that there may be a safe and definite harbor for the ship of state in times of tempest. Great tribulations of government do not arise in periods of administrative calm. They manifest themselves when the clouds are heavy. It is then that a constitution proves its worth in preserving for the people those fundamental principles of free government which are indispensable to the well-being of our democratic institutions.

"If organic law be subverted through expediency, the basic guaranties of liberty are thereby imperiled. This truth is recognized and stated in our Constitution itself in dignified and forceful phraseology:

" 'The provisions of the Constitution of the United States, and of this State, are operative alike in a period of war as in time of peace, and any departure therefrom, or violation thereof, under the plea of necessity, or any other plea, is subversive of good government, and tends to anarchy and despotism.' Sec. 3, Art. I, Const. W.Va."

As to the supremacy of the provisions of the Constitution of the United States, Chief Justice Marshall in Mar-

bury v. Madison, 5 U.S. (1 Cranch) 137, at page 175, 2 L.Ed. 60, used these pertinent words: "This original and supreme will organizes the government, and assigns to different departments their respective powers." which apply equally to the Constitution of this State.

In 4 M. J., Constitutional Law, Section 21, the text is in this language: "The Constitution of the United States was adopted by the whole people of the United States and is a grant of powers acquiesced in by the states themselves; hence, the constitution, and the laws passed by Congress in pursuance thereof, are the supreme law of the land. Next in order of supremacy come the state constitutions, the provisions of which are absolutely binding upon all the departments of the state government. The legislature has no power to pass laws in conflict with either state or federal constitutions. As has been said 'the constitution is law to the lawmakers.' "

With reference to the fundamental and basic character of a State Constitution and in discussing the well established and universal importance and effect of a State Constitution, the text in 16 Am.Jur.2d, Constitutional Law, Section 56, contains these pertinent statements:

"A written constitution is not only the direct and basic expression of the sovereign will, it is also the absolute rule of action and decision for all departments and offices of government with respect to all matters covered by it, and must control as it is written until it is changed by the authority which established it. No function of government can be discharged in disregard of or in opposition to the fundamental law. The state constitution is the mandate of a sovereign people to its servants and representatives. No one of them has a right to ignore or disregard its mandates, and the legislature, the executive

officers, and the judiciary cannot lawfully act beyond its limitations.

"The constitution of each state, so far as it is consistent with the provisions of the Federal Constitution, is the fundamental law of the state and a part of its supreme law, * * *.

"A state constitution is equally binding on the political subdivisions and courts of the state, and on every officer and every citizen. Any attempt to do that which is prescribed in any manner other than that prescribed or to do that which is prohibited is repugnant to that supreme and paramount law and is invalid."

To show the utter lack of authority and the palpable absurdity of the decision in this case. It is only necessary to envision the consequences of the present decision if it is a valid one, which I emphatically deny. The decision strikes down and nullifies provisions of the organic law which creates, maintains and preserves the government of this State which cannot exist and function effectively as a sovereign governmental entity if the integrity of the Constitution as a whole is impaired or destroyed. I submit that in the absence of a decision of the Supreme Court of the United States invalidating any part of the Constitution of this State. that Constitution can not be valid in part and invalid in part but that is the logical result of the holding in this case and that result, to me, is utterly unacceptable.

Furthermore, if the two provisions of the Constitution declared to be invalid by the present decision are, in fact, invalid, so also, in principle and in logic, are all other provisions of the Constitution which require a two-thirds or a three-fourths vote to accomplish the

intended result. There are a number of such provisions and all of them, in principle, under the holding of the majority, are invalid. Some, if not all, of these provisions are:

Section 9, Article IV, relating to impeachment of a state officer, states, in part, that "The senate shall have the sole power to try impeachments, and no person shall be convicted without the concurrence of two-thirds of the members elected thereto.";

Section 19, Article VI, relating to convening of the legislature by the governor, states, in part, that "It shall be his duty to convene it, on application in writing, of three-fifths of the members elected to each house.";

Section 22, Article VI, relating to legislative sessions, states, in part, that "During any thirty-day session the legislature shall consider no other business than the annual budget bill, except such as may be stated in a proclamation issued by the governor at least ten days prior to the convening of the session, or such business as may be stated by the legislature on its own motion in a concurrent resolution adopted by a two-thirds vote of the members elected to each house. All regular sessions may be extended by the concurrence of two-thirds of the members elected to each house.";

Section 29, Article VI, relating to requirement for reading bills, states, in part, that "No bill shall become a law, until it has been fully and distinctly read, on three different days, in each house, unless, in case of urgency, by a vote of four-fifths of the members present, taken by yeas and nays on each bill, this rule be dispensed with: * * *.";

Section 30, Article VI, relating to time acts take effect, states, in part, that "And no act of the legislature, * * *,

shall take effect until the expiration of ninety days after its passage, unless the legislature shall by a vote of two-thirds of the members elected to each house, taken by yeas and nays, otherwise direct.";

Section 7, Article X, relating to duties of county authorities in assessing taxes, states that "County authorities shall never assess taxes, in any one year, the aggregate of which shall exceed ninety-five cents per one hundred dollars valuation, except for the support of free schools; payment of indebtedness existing at the time of the adoption of this Constitution; and for the payment of any indebtedness with the interest thereon, created under the succeeding section, unless such assessment, with all questions involving the increase of such aggregate, shall have been submitted to the vote of the people of the county, and have received three-fifths of all the votes cast for and against it."; and

Section 2, Article XIV, relating to amendments of the Constitution, states, in part, that "Any amendment to the Constitution of the State may be proposed in either house of the Legislature; and if the same, being read on three separate days in each house, be agreed to on its third reading, by two thirds of the members elected thereto, the proposed amendment, with the yeas and nays thereon, shall be entered on the journals, * * *."

Moreover, if the decision of the majority in this proceeding is valid, and I again emphatically assert that it is not, the Constitution of this State, instead of being altered or amended by the people of this State by the exercise of their exclusive rights so to do, can be invalidated in any of its provisions if, in the opinion of three members of this Court, any such provision is, or provisions are, contrary to, in conflict with, or violative

of the Constitution of the United States. I submit that such result was not only never intended but was not even envisioned by the people of this State when they ratified the present Constitution, and that no such result was ever intended by the people of the United States when they ratified the Federal Constitution. Any such result violates the fundamental constitutional principle as stated by the great Chief Justice of the United States, John Marshall, in 1821, in Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, at page 389, 5 L.Ed 257, in this language: "The people made the constitution, and the people can unmake it. It is the creature of their will, and lives only by their will." Though the Chief Justice was speaking of the Federal Constitution, his above quoted pronouncement directly applies to the Constitution of this State and the application of that principle prohibits absolutely any alteration, amendment, or action to invalidate the Constitution of this State by any agency of this State, for only the people themselves possess and can exercise that power.

With respect to the effect of the current decision, I am frank to say that notwithstanding my experience of more than a half century as a member of the legal profession and for more than a quarter century as a judge of a Circuit Court and of the Supreme Court of Appeals of this State, I never expected to see the day when any court of this State would formally undertake to declare unconstitutional any provision of the organic law of this State; and I feel that the great majority of the people of this State share my feeling of amazement, surprise and disbelief with respect to the present decision. Furthermore, I submit that those persons, few in number, who on television and by radio hailed the decision with expressions of delight and characterized

it as wonderful, when they realize the effect of the present decision upon the governmental structure of this State and upon the rights of the people under their Constitution, will be prone to change their expressions of delight to expressions of apprehension and alarm. I favor all possible and proper aid to education and, if I had been eligible to vote in Roane County, I would have voted to authorize the issuance of the bonds which a sufficient number of the voters of that county refused to authorize at the recent election; but I am unwilling to further the cause of education at the expense of destroying the integrity or impairing the validity of the fundamental law of this State.

The worst and most disturbing and disastrous feature of the present decision, in addition to its harmful effect upon the constitutional structure of this State, is the realization that if this Court has the power and authority to invalidate the two provisions of the Constitution here involved, it can, whenever it sees fit to do so, under the guise that they violate the Constitution of the United States, invalidate any other provision or all of the provisions of the Constitution and by so doing impair and destroy the integrity of the constitutional structure of this State. That it may never do so does not remove or set at rest the threat that it can exercise the power which according to the present decision it now possesses. I submit that those who framed and ratified the Constitution of the United States and the Constitutions of the various states of the Union never intended, or even imagined, that any court created by any of those Constitutions would ever claim to possess or exercise and usurp any such unlimited power.

Of course, as stated in the majority opinion, the pro-

vision of Article VI of the Constitution of the United States that "This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.", is the supreme law of the land. This provision, however, as I have demonstrated, has no application to the two constitutional provisions under consideration in this case. It is clear that no treaty relates to either of those constitutional provisions. It is equally clear that no law of the United States made pursuant to the Constitution which, of course, means acts or resolutions of Congress, as the Supreme Court does not make but instead interprets and declares the law, applies to or is inconsistent with either of such constitutional provisions. Whether the Supreme Court of the United States may invalidate the constitutional provisions in question is not involved and need not be considered in this proceeding, other than to say that it has not, in any reported case, declared such provisions to be unconstitutional. But conceding that the Supreme Court of the United States may declare such provisions unconstitutional, it does not follow that this Court can do so or can exercise any of the powers of that Court. Nor is either of the constitutional provisions inconsistent with or violative of any provision of the Constitution of the United States or of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States which is the constitutional provision on which the majority relies in reaching its conclusion in this proceeding.

That there is no conflict or inconsistency between the two constitutional provisions here involved and the Equal Protection Clause of the Fourteenth Amendment is clearly established by the existence of numerous similar provisions of the Constitution of the United States by which a two thirds vote or a three fourths vote is required to accomplish the intended and sought for result. Some, if not all, of these provisions in the Federal Constitution are:

Article I, Section 3, relating to impeachments, states, in part, that "And no Person shall be convicted without the Concurrence of two thirds of the Members present.";

Article I, Section 7, relating to the passage of bills and resolutions, states, in part, that "If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law."; and "Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary * * * shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.";

Article II, Section 2, relating to the powers of the President, states, in part, that "He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur;"; and

Article V, relating to Amendments to the Constitution, states, in part, that "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress;".

There is no conflict or inconsistency between the above quoted constitutional provisions and the Equal Protection Clause of the Fourteenth Amendment and all such provisions are, of course, valid and effective. I submit that if there is no conflict or inconsistency between such provisions of the Federal Constitution and the Equal Protection Clause, and no court has ever indicated that there is any such conflict or inconsistency, it necessarily follows that there is no inconsistency between the Equal Protection Clause and the two constitutional provisions here involved and the other provisions of the Constitution of this State which are similar to the quoted provisions of the Constitution of the United States, all of which require more than a majority vote to resolve a particular question in the accomplishment of the intended result. In the absence of any such conflict or inconsistency, the two constitutional provisions are not unconstitutional as violative of any provision of the Constitution of the United States or the Amendments to it and in consequence can not be validly held to be unconstitutional by any decision of this Court. It is impossible for me to understand how provisions of the Constitution

of this State which are similar or identical with valid provisions of the Constitution of the United States can be held to be unconstitutional as violative of that Constitution. There is no presumption or determination of the unconstitutionality of those provisions in the absence of a decision of the Supreme Court of the United States holding such provisions to be unconstitutional as violative of the provisions of the Constitution of the United States or the Due Process and Equal Protection Clauses of the Fourteenth Amendment and, as heretofore stated, there has been no such decision of the Supreme Court of the United States or any decision by it which can reasonably be construed to apply to and render unconstitutional the two constitutional provisions involved in this case.

The contention that no conflict or inconsistency exists between the two constitutional provisions in question and the Equal Protection Clause was presented and urged upon this Court in the argument of this case but was summarily dismissed, without adequate study or consideration, as "frivilous and wholly beside the point." Such action was unfortunate. The contention deserved a kinder fate and if it had been properly considered would, or, at least, should have prevented the erroneous and unfortunate decision in this case. The analogies between the two constitutional provisions in question and other provisions of the Constitution of this State and similar provisions of the Constitution of the United States which require more than a majority vote to accomplish the intended result are not mentioned or presented as a challenge to the constitutionality of those provisions in the Federal Constitution, which, of course, can not be seriously asserted but are mentioned to show that as those provisions are constitutional and valid, similar provisions

in the Constitution of this State are likewise constitutional and valid. And this issue was not even considered by the majority.

As the two constitutional provisions in question are not violative of the Equal Protection Clause or of any provision of the Federal Constitution, the provisions of the supremacy clause of that Constitution that the judges in every state shall be bound by that Constitution, do not authorize or empower this Court in the first instance to invalidate either of the two constitutional provisions. The meaning and the effect of that provision of the supremacy clause are that if a provision of the Constitution of any State is clearly violative of the Federal Constitution and such violation has been determined by a court of competent jurisdiction or such provision has been invalidated by any treaty or law of the United States or by any amendment to the Federal Constitution, the judges of such State shall, of course, adhere to and follow the Federal Constitution and the laws made pursuant to it and the treaties made under the authority of the United States, and shall reject and refuse to recognize as valid the Constitution and the laws of any State found to be in conflict with the supremacy clause. To do that is one thing. It is an entirely different thing for the Supreme Court of a State, in the first instance and before the invalidity of a provision of a State Constitution has been determined as indicated, to invalidate the State Constitution which creates such court or any provision of such Constitution.

The basic error in the decision of the majority in this case is the view that the two constitutional provisions in question are inconsistent with and violate the recently promulgated doctrine or principle of one person-one vote

developed and applied by the Supreme Court of the United States in a series of cases beginning with Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed. 2d 663. In those cases the Court held that the courts have jurisdiction to determine the constitutionality of statutes which provide for the selection of legislators on the basis of unequal population apportionment, and has declared such statutes to be unconstitutional as violative of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, and that seats in the legislative branch of a state government much be apportioned substantially upon a population basis and that political equality means one person-one vote. Some of the leading cases are Gray v. Sanders, 372 U.S. 368, 83 S.Ct. 801, 9 L.Ed. 2d 821; Wesberry v. Sanders, 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481; Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d. 506; WMCA, Inc. v. Lomenzo, 377 U.S. 633, 84 S.Ct. 1418, 12 L. Ed. 2d 568; Maryland Committee for Fair Representation v. Tawes, 377 U.S. 656, 84 S.Ct. 1429, 12 L.Ed.2d 595; Davis v. Mann, 377 U.S. 678, 74 S.Ct. 1441, 12 L.Ed.2d 609; Roman v. Sincock, 377 U.S. 695, 84 S.Ct. 1449, 12 L.Ed. 2d 620; Lucas v. Forty-Fourth General Assembly of State of Colorado, 377 U.S. 713, 84 S.Ct. 1459, 12 I.Ed.2d 632; Hearne v. Smylie, 378 U.S. 563, 84 S.Ct. 1917, 12 L.Ed.2d 1036; Pinney v. Butterworth, 378 U.S. 564, 84 S.Ct. 1918, 12 L.Ed.2d 1037; and Hill v. Davis, 378 U.S. 565, 84 S.Ct. 1918, 12 L.Ed.2d 1037.

In fact and in law, and contrary to the view of the majority, the two constitutional provisions in question are not inconsistent with the one person-one vote principle and that principle was not disregarded or violated at the school bond election in Roane County in which the proponents of the additional levy and the bonds failed to

obtain a vote of sixty per cent in favor of the levy and a vote of three-fifths in favor of the bonds. The holdings in all the above cited cases, except Lucas v. Forty-Fourth General Assembly of State of Colorado, 377 U.S. 713, 84 S.Ct. 1459, 12 L.Ed.2d 632, involved the constitutionality of legislative apportionment schemes of plans adopted by several states of the Union, and such holdings are not applicable to the case at bar. In each of those cases the apportionment of seats in one or both houses of a state legislature was declared to be violative of the Equal Protection Clause of the Fourteenth Amendment on the ground that the apportionment on a population basis with respect to different political subdivisions of the state was unequal and that a person's right to vote for State legislators was unconstitutionally impaired when its weight was substantially debased or diluted in comparison with votes of citizens living in other subdivisions of the state.

In the *Reynolds* case, cited and relied upon by the majority, it appeared, among other conditions, that in certain senatorial districts and counties of the State of Alabama, under statutory enactments, population variance of ratios of up to about forty-one to one existed in the senate and up to about sixteen to one existed in the house; that in Bullock County with a population of 13,462 and Henry County with a population of only 15.286, each county was allocated two seats in the Alabama House, whereas Mobile County with a population of 314,301 was given only three representatives and Jefferson County with a population of 634,864 had only seven representatives, and there was a similar inequality in the senatorial apportionment. In that situation it was clear that the vote of the citizens of Mobile County with 314,301 people and of Jefferson County with 634.864. people was greatly outweighed and diluted in comparison with

the weight of the vote of the citizens of the smaller Counties of Bullock and Henry.

When the Court in those cases referred to the debasement of the right to vote caused by the malapportionment of the legislative apportionment plan it referred to a situation which did not exist in any respect in connection with the levy and the bond election vote under the constitutional provisions involved in this case. In that election there was no debasement or dilution of the vote of any voter who cast a vote for or against the levy or the bonds and no voters were disqualified. The question of apportionment on any population basis was not involved or considered and the requirement of one person-one vote was fully complied with and satisfied. Each voter in that election cast one vote and each vote so cast was counted as one vote for one voter. The only thing of which the plaintiffs in this proceeding can complain is that they and those associated with them who favored the authorization of the levy and the bonds did not get enough votes to win the election. The issue here involved is as simple as that and is the only issue involved. It is pertinent to observe, also, in all the cases cited, except the *Lucas* case, that the apportionment plan was created by statute and the validity of any constitutional provision of that kind was not involved. Of course, in those instances the Equal Protection Clause was violated but there was no such violation in connection with the levy and the bond election under the constitutional provisions that required a sixty per cent vote to authorize the levy and a three-fifths vote to authorize the issuance of the bonds.

In the *Gray* case, cited in the majority opinion, a legislative apportionment plan relating to the selection of

state legislators of the State of Georgia, known as the County-Unit System under which the votes of persons living in large counties were given no more weight than the weight given to fewer votes of persons living in small counties, was involved; and in the *Wesberry* case a state statutory apportionment plan, relating to the selection of congressmen in the State of Georgia, was likewise involved. In the *Wesberry* case the Court held that one man's vote in a congressional election must be worth as much as another's vote in such election. In short the one person-one vote principle was designed to secure equal representation on a population basis, and that question is not pertinent or involved in connection with the Roane County school bond election.

The rule of the above cited apportionment cases does not apply to or recognize any debasement or dilution of the votes of the citizens in each area among themselves and within that area, for the vote of each citizen in each area is of equal weight in the selection of their representatives. Accordingly, I repeat, those cases do not apply to the votes cast at the Roane County school bond election for the reason that no issue of apportionment with respect to the selection of any governmental representative on an unequal population basis, or no issue of the comparative value of the votes cast is involved. Each person who voted at that election cast one vote and that one vote was duly counted and was given the value of one vote of one person. The one person- one vote principle was complied with fully and the inability of those who failed to obtain enough votes to win the election was not due to any debasement or dilution of their vote but was due to the lack of enough affirmative votes to win the election. The votes cast by the individual voters

were counted alike and all of them were of equal weight and value.

Furthermore, none of the apportionment cases produced or applied a formula like the formula conjured up by the plaintiffs and applied by the majority in this case by which a single negative vote at an election in which sixty per cent or three-fifths of the votes cast is required to win the election is given the weight or the value of one and one-half times a single affirmative vote or by which negative votes were evaluated on the basis that two minority votes were equal to three affirmative votes. By that formula one affirmative winning vote, even in an election in which only a majority vote is required to win and in which there are 5999 affirmative votes and 4000 negative votes or a total of 9999 votes, would be given the weight and value of one and one-half times one negative vote and two affirmative votes would be given the weight and value of three negative votes and, in consequence, the negative votes would be illegally debased and diluted to that extent. This hypothesis shows the utter unreliability of and the obviously fallacious result that could be accomplished by a formula that could invalidate any election whether conducted on a sixty per cent or a majority vote basis. By such a formula the unanimous vote requirement for a verdict of a jury could be invalidated because the vote of one dissenting juror can outweigh the combined votes of the other eleven jurors and the traditional unanimous consent rule could be abrogated because the vote of one dissenting member can outweigh the votes of all the other members. No decision of any court other than the decision in the case at bar, to my knowledge, has recognized or applied any such arbitrary or capricious method of evaluating votes in determining the result of an election.

The New Mexico case of State ex rel. Witt v. Canvassing Board, 78 N.M. 682, 437 P.2d 143, cited in the majority opinion, was also an apportionment case and involved an apportionment of the votes of the citizens of the various counties of that state on a grossly unequal population basis in an election to amend a provision of the Constitution of that state. The court in that case applied the one person-one vote principle of the Federal apportionment cases to an election to amend a provision of the Constitution of that state and held that the constitutional requirement of a two thirds vote in each county to amend the provision of the Constitution of that state relating to the elective franchise, was violative of the one person-one vote principle and unconstitutional for that reason. That case is clearly inapplicable to the case at bar; but whatever may be the effect of the holding in that case, it is not binding authority on this Court and it is not even persuasive authority for me. It may be of interest to state, however, that the same New Mexico Court that decided the *Witt* case and invalidated a provision of the Constitution of that state, said, as I say in this case, that when a proposal to amend a Constitution to abolish a state office was defeated at the polls by the people, to sanction legislative repeal of that office, just as it is to sanction invalidation in that situation by a State court decision, would thwart the constitutional provision and defeat the will of the people as expressed at the polls. Thompson v. Legislative Audit Commission, 79 N.M. 693, 448 P.2d 799.

The majority opinion cites and relies on the cases of Carrington v. Rash, 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed.2d 675; Kramer v. Union Free School District No. 15, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583; and Cipriano v. City of Houma, 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d

647. Each of those cases is utterly inapplicable to the case at bar. In each of them a particular group of citizens was excluded from the exercise of the elective franchise and in each case the Supreme Court of the United States held that the state constitutional provision or the statutory provision effecting such exclusion was invalid. It is perhaps unnecessary to point out further the inapplicability of any of those decisions to the case at bar but, to indicate the difficulty experienced by the majority in attempting to find a pertinent citation of authority on which to rest its unprecedented decision in this case, I shall show that none of those decisions has any present application.

The *Carrington* case dealt with a provision of the Constitution of the State of Texas which permitted a military serviceman to vote only in the county where he resided when he entered the service. The petitioner was a member of the armed services who had moved to Texas in 1962. He was a resident of and intended to make his home in that state. Under the foregoing constitutional provision he was denied the right to vote. The Supreme Court of Texas held that constitutional provision to be valid but on certiorari the Supreme Court of the United States reversed and held that though a state can impose reasonable residence requirements for voting, it can not, under the Equal Protection Clause deny a ballot to a bona fide resident merely because he is a member of the armed services. In the opinion the Court said: "We recognize that special problems may be involved in determining whether servicemen have actually acquired a new domicile in a State for franchise purposes. We emphasize that Texas is free to take reasonable and adequate steps, as have other States, to see that all applicants for the vote actually fulfill the requirements of

bona fide residence. But this constitutional provision goes beyond such rules. * * *. All servicemen not residents of Texas before induction come within the provision's sweep. Not one of them can ever vote in Texas, no matter how long Texas may have been his true home. '[T]he uniform of our country * * * [must not] be the badge of disfranchisement for the man or woman who wears it.' " Manifestly the decision of the Supreme Court of the United States, not the Supreme Court of Texas, that the constitutional provision which disfranchises a particular group of citizens was unconstitutional, has no application whatsoever to the case at bar. No citizen who voted at the Roane County school bond election was disqualified from voting and why the *Carrington* case is cited by the majority is a mystery to me.

In the *Kramer* case a New York statute provided that three classes of persons were qualified, under the law of that state, to vote in school elections: (1) Parents or guardians of children attending public schools within the district; (2) persons who own taxable real property within the district, and their spouses; (3) persons who lease taxable real property within the district, and their spouses. The applicant in that case, a bachelor who lived with his parents and who neither owned nor leased any real estate within the district and, not being within any of the three classes, was disqualified from voting despite the fact that he met the general age and residence requirements imposed by state law. The court held the statute to be violative of the Equal Protection Clause of the Fourteenth Amendment and to be unconstitutional. For the reason indicated in connection with the *Carrington* case, the decision in the *Kramer* case is clearly inapplicable to the case at bar.

In the *Cipriano* case, a Louisiana statute permitted only "property taxpayers" to vote in elections called to approve the issuance of revenue bonds by a municipal utility. This disqualifying statute was held to be unconstitutional not because it debased or diluted the vote of any person but because it arbitrarily disqualified a person from voting in a municipal bond election who was otherwise duly qualified to vote in other elections. The statute also disqualified 6926 other non-property taxpayers who were qualified voters in the City of Houma. The decision in this case closely resembles the *Kramer* case and is, for the same reason utterly inapplicable to the case at bar. This manifestly inapplicable decision was cited in the majority opinion for the unconvincing stated reason that "We deem this decision in point because it dealt with a local election and the rights of voters in an election dealing with the issuance of municipal bonds as distinguished from an election to nominate or elect public officials." I can detect not even a remote connection between the question of the authorization of an issue of municipal bonds at a local election and the applicability or the non-applicability of the one person-one vote principle in evaluating the votes cast at such an election and, as already indicated, that question was not involved or considered in the election dealt with in the *Cipriano* case.

The action of the majority of this Court, in glorifying and clothing with omnipotence a majority vote in any election and in proscribing any requirement of a two thirds or a three fourths vote to accomplish the intended result, shows a surprising lack of consideration of one of the fundamental functions or basic purposes of a written constitution for any governmental sovereign, whether such sovereign is the Nation or a State of the Union. That function or purpose is, of course, to protect the individual

against the power of government and to safeguard the minority against the tyranny of the majority, which by its power can generally achieve its political and governmental objectives, and to prevent the majority from usurping or destroying the rights of the minority. Such restraint upon the unlimited power of the majority is a salutary and essential restraint and is a valid constitutional limitation as evidenced by provisions of that nature in the Constitution of the United States and in every state Constitution.

The text in 16 Am.Jur.2d, Constitutional Law, Section 4, discusses these universally recognized characteristics of a written constitution in this language: "The term 'constitution' implies an instrument of a permanent and abiding nature. A constitution, unlike a statute, is intended not merely to meet existing conditions but also to govern the future. Although this characteristic of a written constitution may at times obstruct progress, its stability is intended to protect the people from frequent and violent fluctuations of public opinion, since the constitutions, state and federal, are limitations on the power of the people as against the impulses of mere majorities." Section 6 of the same authority, with respect to functions of constitutions generally, contains these statements: "Perhaps the most important of the fundamental functions of a constitution is to establish the basis of the governmental system, that is, to prescribe the permanent framework of the system of government, assign to the different departments their respective powers and duties, and establish certain fixed first principles on which government is founded."

By its unwarranted exaltation of the rule of the majority in this instance, the majority has reached an incon-

sistent and, to me, an intolerable result. In proclaiming the supremacy of the majority in the Roane County school bond election, it has permitted five dissatisfied, defeated and frustrated citizens and taxpayers of that county who cast affirmative majority votes in that election, with the aid of this Court, to thwart, defeat, and overcome the express will of a majority of the voters of this State who, less than three years ago, by a vote of 212,883 to 206,542, or a majority of 6341 votes, at the state wide general election in 1966, refused to ratify an amendment which would have removed the three fifths vote requirement from the Constitution of this State. By its decision, the majority of this Court, contrary to the recently expressed will of the majority of the voters of this State, now invalidates the three fifths vote requirement of the Constitution in the name of the Equal Protection Clause of the Fourteenth Amendment. Of course, I can not sanction, subscribe to, or concur in any such result.

In recent years the Supreme Court of the United States has been widely criticized and charged with changing the Constitution of the United States by its interpretation of some of its provisions to give them a meaning not justified by the language of the Constitution. Now, unfortunately, for the first time, this Court, by the tortured and unwarranted application of the one person-one vote principle to a situation to which it clearly does not apply, and by invalidating clearly valid provisions of the fundamental law of this State which its people want retained in force and effect and are unwilling to change, becomes vulnerable to the same type of criticism. This I deeply regret and deplore.

At the expense of the invalidation of two provisions

of the Constitution of this State and the threat of the invalidation of other provisions of that basic law, it can now be truly said that it is hard and expensive to obtain an education in West Virginia. A much easier, less expensive, less hazardous and a more acceptable and orderly way to obtain such an education would be for the people of this State to amend these now invalid provisions of our State Constitution by their vote in the manner provided by Article XIV of that fundamental law. Until they are so amended or until in an election three fifths of the voters of a particular county express their wish for a bond issue or sixty per cent of the voters of such county express their wish for the additional tax levy, the minority of less than three fifths of the voters and sixty per cent of the voters in that area should not, in a free society, be forced to accept the tax burdens and to pay for such bonds. Instead they should be persuaded, as I think they can be, to authorize the levy and the bonds in accordance with the provisions of Article X, Sections 1 and 8, of the Constitution of this State.

I would affirm the judgment of the Circuit Court of Roane County and dismiss this consolidated action at the cost of the plaintiffs.

On Rehearing

CALHOUN, Judge.

On the rehearing of this consolidated action, heretofore granted for the limited purpose of considering the motion of A. T. Gordon and others for permission to intervene and be made parties defendant hereto, upon full consideration of the motion, as amended, such motion is sustained and the movants are permitted to intervene and to be made defendants to this consolidated action. The re-

hearing having been granted for the limited purpose of considering the motion to intervene, the Court refuses to reconsider or modify its holding on the merits and accordingly the final judgment rendered July 8, 1969, upon the merits, is reaffirmed without change or modification in any respect, other than to grant the motion, as amended, to permit the movants to intervene and to be made parties defendant to this consolidated action. Accordingly, the original opinion and the prefixed syllabus points are approved, adhered to and adopted as the decision of this Court in this proceeding and the judgment of the circuit court indicated in the original opinion is reversed and this action is remanded to that court.

Reversed and remanded.

HAYMOND, President (dissenting):

I concur in the action of the Court in granting the motion to intervene and in permitting the movants to be made defendants to this consolidated action but I dissent from the majority opinion on the rehearing of this action in refusing to reconsider or modify its holding on the merits and in affirming its final judgment of July 8, 1969, and I adopt, without change or modification, the dissenting opinion heretofore filed by me in this proceeding.

APPENDIX 4A

Constitution of West Virginia, Article X, Section 1: (So far as pertinent)

"Subject to the exceptions in this section contained taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value to be ascertained as directed by law. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value; except that the aggregate of taxes assessed in any one year upon personal property employed exclusively in agriculture, including horticulture and grazing, products of agriculture as above defined, including live stock, while owned by the producer, and money, notes, bonds, bills and accounts receivable, stocks and other similar intangible personal property shall not exceed fifty cents on each one hundred dollars of value thereon and upon all property owned, used and occupied by the owner thereof exclusively for residential purposes and upon farms occupied and cultivated by their owners or bona-fide tenants one dollar; and upon all other property situated outside of municipalities, one dollar and fifty cents; and upon all other such property situated within municipalities, two dollars; and the legislature shall further provide by general law, for increasing the maximum rates, authorized to be fixed, by the different levying bodies upon all classes of property, by submitting the question to the voters of the taxing units affected, but no increase shall be effective unless at least sixty per cent of the qualified voters shall favor such increase, . . ."

APPENDIX 4B

Constitution of West Virginia, Article X, Section 8:

"No county, city, school district, or municipal corporation, except in cases where such corporations have already authorized their bonds to be issued, shall hereafter be allowed to become indebted, in any manner, or for any purpose to an amount, including existing indebtedness, in the aggregate, exceeding five per centum on the value of the taxable property therein to be ascertained by the last assessment for State and county taxes, previous to the incurring of such indebtedness; nor without, at the same time, providing for the collection of a direct annual tax on all taxable property therein, in the ratio, as between the several classes or types of such taxable property, specified in section one of this article, separate and apart from and in addition to all other taxes for all other purposes, sufficient to pay, annually, the interest on such debt, and the principal thereof, within, and not exceeding thirty-four years. Such tax, in an amount sufficient to pay the interest and principal on bonds issued by any school district not exceeding in the aggregate three per centum of such assessed value, may be levied outside the limits fixed by section one of this article: Provided, that no debt shall be contracted under this section, unless all questions connected with the same, shall have been first submitted to a vote of the people, and have received three-fifths of all the votes cast for and against the same."

APPENDIX 4C

West Virginia Code, 1931, as amended, Chapter 13, Article 1, Section 4: (So far as pertinent)

"No debt shall be contracted or bonds issued under this article until all questions connected with the same shall have been first submitted to a vote of the qualified electors of the political division for which the bonds are to be issued, and shall have received three fifths of all the votes cast for and against the same."

APPENDIX 4D

West Virginia Code, 1931, as amended, Chapter 13, Article 1, Section 14: (So far as pertinent)

"If three fifths of all the votes cast for and against the proposition to incur debt and issue negotiable bonds shall be in favor of the same, the governing body of the political division shall, by resolution, authorize the issuance of such bonds in an amount not exceeding the amount stated in the proposition; . . ."

APPENDIX 4E

West Virginia Code, 1931, as amended, Chapter 11, Article 8, Section 16: (So far as pertinent)

"The local levying body shall submit to the voters within their political subdivision, the question of the additional levy at either a general or special election. If at least sixty per cent of the voters cast their ballots in favor of the additional levy, the local levying body may impose the additional levy."

APPENDIX 4F

Constitution of West Virginia, Article XIV, Section 2

"Any amendment to the Constitution of the State may be proposed in either house of the legislature; and if the same, being read on three several days in each house, be agreed to on its third reading, by two thirds of the members elected thereto, the proposed amendment, with the yeas and nays thereon, shall be entered on the journals, and it shall be the duty of the legislature to provide by law, for submitting the same to the voters of the State for ratification or rejection at the next general election thereafter, and cause the same to be published, at least three months before such election in some newspaper in every county in which a newspaper is printed. And if a majority of the qualified voters, voting on the question at the polls held pursuant to such law, ratify the proposed amendment, it shall be in force from the time of such ratification, as part of the Constitution of the State. If two or more amendments be submitted at the same time, the vote on the ratification or rejection shall be taken on each separately, but an amendment may relate to a single subject or to related subject matters and may amend or modify as many articles and as many sections of the Constitution as may be necessary and appropriate in order to accomplish the objectives of the amendment."

Supreme Court of the United States

No. 1244 ....., *October Term, 19* 69

A. T. Gordon, et al.,

Petitioners,

v.

Granville H. Lesco, et al.

Order allowing certiorari. *Filed* April 6 ....., *19* 70.

The petition herein for a writ of certiorari to the Supreme Court of the State of Court of Appeals of West Virginia *is granted,* and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

FILED
FEB 26 1970

No. 96

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

A. T. GORDON, ET AL.,

Petitioners and
Intervening Defendants Below,

VS.

GRANVILLE H. LANCE, ET AL.,

Respondents and
Plaintiffs Below,

AND

THE BOARD OF EDUCATION OF THE COUNTY OF ROANE, *a corporation,* ET AL.,

Respondents and
Defendants Below.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

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February 1970

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No.....

OCTOBER TERM, 1969

IN THE

Supreme Court of the United States

A. T. GORDON, GEORGE MOFFATT, V. E. GREENLEAF, C. C. CONLEY, H. G. EVERLY, ROY R. GRIFFITH, J. E. OAKLEY, HARLAN H. ALVIS, CARL MACE, C. ROY KEITH, C. A. PARSONS, CHARLES HICKMAN, ROBERT J. KNOPP, CHARLES T. KNOPP, HUBERT JONES and A. D. LUPARDUS,

Petitioners and Intervening Defendants Below,

v.

GRANVILLE H. LANCE, FRED HILL, CHESTER C. DODD, JR., BRADY D. HICKEL, JR., and JOE CRADDOCK,

Respondents and Plaintiffs Below,

and

THE BOARD OF EDUCATION OF THE COUNTY OF ROANE, *a corporation*, JOHN W. STONE, CHARLES ELBA ROBINSON, H. D. JONES, BENJAMIN HICKEL and JOHN N. COTTLE, *members of the Board of Education of the County of Roane*, and MIRRELL CLARK, *Superintendent of Schools of Roane County, West Virginia,*

Respondents and Defendants Below.

CASE NO._____

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

The Petitioners, A. T. Gordon, George Moffatt, V. E. Greenleaf, C. C. Conley, H. G. Everly, Roy R. Griffith, J. E. Oakley, Harlan H. Alvis, Carl Mace, C. Roy Keith, C. A. Parsons, Charles Hickman, Robert J. Knopp, Charles T. Knopp, Hubert Jones and A. D. Lupardus, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Appeals of the State of West Virginia, entered in this proceeding on July 8, 1969.

OPINION BELOW

The opinion of the Supreme Court of Appeals of the State of West Virginia is reported in 170 *S. E. 2d* 783, ———W. Va. ———, a true copy of which is set forth herein and marked for identification "Appendix A".

JURISDICTION

The judgment of the Supreme Court of Appeals of the State of West Virginia was entered pursuant to the opinion aforesaid on July 8, 1969. On August 6, 1969, a timely Petition was filed by your Petitioners for Leave to Intervene as additional parties defendant and for Rehearing. By judgment entered November 11, 1969, a true copy of which is set forth herein and marked for identification "Appendix B," said Court granted Petitioners leave to intervene as additional parties defendant and refused to reconsider or modify its judgment of July 8, 1969. A timely Petition for Rehearing was thereupon filed by your Petitioners which was denied by order of said Court entered on December 2, 1969, a true copy of which is set forth herein and marked for identification "Appendix C". By further order entered by said Court on Dec-

ember 8, 1969, execution of the judgment of the said Court was stayed pending the filing of this Petition with this Court for a writ of certiorari and pending final action of this Court upon said Petition, a true copy of which is set forth herein and marked for identification "Appendix D". This Petition for certiorari was filed within ninety (90) days from the day of adjournment of the September, 1969 term of said Court, which adjourned on December 19, 1969. This Court's jurisdiction is invoked under Title 28 *U. S. C.*, Section 1257 (3).

QUESTIONS PRESENTED FOR REVIEW

1. Do the three-fifths vote requirement of the West Virginia Constitution and the statutes dealing with elections held by political subdivisions of the state for determination of whether bond indebtedness should be incurred, and the 60 per cent vote requirement provided by the West Virginia Constitution and statutes relating to elections to authorize local tax levying bodies to make additional levies for tax purposes in excess of levy rates provided for in the Tax Limitation Amendment to the West Virginia Constitution, conflict with and violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

2. Does "equal protection of the laws" mean "majority rule" in elections concerning bonded indebtedness or tax levies?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Constitution of the United States, Amendment XIV.

2. Constitution of West Virginia, Article X, Section 1: (So far as pertinent)

"Subject to the exceptions in this section contained taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value to be ascertained as directed by law. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value; except that the aggregate of taxes assessed in any one year upon personal property employed exclusively in agriculture, including horticulture and grazing, products of agriculture as above defined, including live stock, while owned by the producer, and money, notes, bonds, bills and accounts receivable, stocks and other similar intangible personal property shall not exceed fifty cents on each one hundred dollars of value thereon and upon all property owned, used and occupied by the owner thereof exclusively for residential purposes and upon farms occupied and cultivated by their owners or bona-fide tenants one dollar; and upon all other property situated outside of municipalities, one dollar and fifty cents; and upon all other such property situated within municipalities, two dollars; and the legislature shall further provide by general law, for increasing the maximum rates, authorized to be fixed, by the different levying bodies upon all classes of property, by submitting the question to the voters of the taxing units affected, but no increase shall be effective unless at least sixty per cent of the qualified voters shall favor such increase, . . ."

3. Constitution of West Virginia, Article X, Section 8:

"No county, city, school district, or municipal corporation, except in cases where such corporations have already authorized their bonds to be issued, shall hereafter be allowed to become indebted, in any manner, or for any purpose to an amount, including existing indebtedness, in the aggregate, exceeding five per centum on the value of the taxable property therein to be ascertained by the last assess-

ment for State and county taxes, previous to the incurring of such indebtedness; nor without, at the same time, providing for the collection of a direct annual tax on all taxable property therein, in the ratio, as between the several classes or types of such taxable property, specified in section one of this article, separate and apart from and in addition to all other taxes for all other purposes, sufficient to pay, annually, the interest on such debt, and the principal thereof, within, and not exceeding thirty-four years. Such tax, in an amount sufficient to pay the interest and principal on bonds issued by any school district not exceeding in the aggregate three per centum of such assessed value, may be levied outside the limits fixed by section one of this article: Provided, that no debt shall be contracted under this section, unless all questions connected with the same, shall have been first submitted to a vote of the people, and have received three-fifths of all the votes cast for and against the same."

4. West Virginia Code, 1931, as amended, Chapter 13, Article 1, Section 4: (So far as pertinent)

"No debt shall be contracted or bonds issued under this article until all questions connected with the same shall have been first submitted to a vote of the qualified electors of the political division for which the bonds are to be issued, and shall have received three fifths of all the votes cast for and against the same."

5. West Virginia Code, 1931, as amended, Chapter 13, Article 1, Section 14: (So far as pertinent)

"If three fifths of all the votes cast for and against the proposition to incur debt and issue negotiable bonds shall be in favor of the same, the governing body of the political division shall, by resolution, authorize the issuance of such bonds in an amount not exceeding the amount stated in the proposition; . . ."

6. West Virginia Code, 1931, as amended, Chapter 11, Article 8, Section 16: (So far as pertinent)

"The local levying body shall submit to the voters within their political subdivision, the question of the additional levy at either a general or special election. If at least sixty per cent of the voters cast their ballots in favor of the additional levy, the local levying body may impose the additional levy."

STATEMENT OF THE CASE

On April 29, 1968, the Respondent, The Board of Education of the County of Roane, a governmental corporation and a political subdivision of the State of West Virginia, submitted to the voters of Roane County a proposal calling for the issuance of general obligation bonds in the amount of $1,830,000 to be retired over a period of not more than twenty (20) years from the date of issuance thereof, with interest not exceeding 5½ per cent per annum for the purpose of constructing new school buildings and making other improvements to the educational facilities of Roane County. On the same date by separate ballot there was also submitted to the voters of Roane County a proposal to authorize the Board of Education to lay additional tax levies in excess of the constitutionally authorized rates for a period of five (5) years, the proceeds of which were to be used for current expenditures and capital improvements. A canvass of the results of the election disclosed that 2,887, or 51.55 per cent of the total votes cast on the question of the issuance of bonds, favored the issuance thereof, and that 2,866, or 51.51 per cent of the total votes cast on the question of authorizing the additional tax levies, favored the additional levies. The canvassing authority, under the constitutional and statutory provisions quoted hereinabove, concluded that each proposal did not obtain the necessary

affirmative votes and declared that both issues had failed of passage.

Thereupon, Respondents, Granville H. Lance, Fred Hill, Chester C. Dodd, Jr., Brady D. Hickel, Jr., and Joe Craddock, plaintiffs below, appeared before the Board of Education as citizens, voters and taxpayers of Roane County and spoke in their own behalf and, purporting to speak on behalf of all other persons who voted in the affirmative on each of the issues submitted, demanded that the Board authorize the issuance and sale of the bonds and that the Board lay the additional tax levies notwithstanding the constitutional and statutory provisions to the contrary. They then asserted that the statutory and constitutional provisions above quoted violated the equal protection clause of the Fourteenth Amendment to the United States Constitution and also violated the provisions of Article IV, Section 4 of the Constitution of the United States which guarantees to every state a republican form of government. The Board, of course, refused to grant the demands of the plaintiffs below.

Shortly thereafter the said Respondents, plaintiffs below, instituted two separate declaratory judgment actions in the Circuit Court of Roane County, the first seeking a declaration that the constitutional and statutory provisions above quoted pertaining to the issuance of general obligation bonds, and the second seeking a declaration that the constitutional and statutory provisions concerning the laying of excess levies, each be declared unconstitutional and void as violative of the Fourteenth Amendment and of Article IV, Section 4 of the Constitution of the United States. The actions were consolidated and after the Circuit Court of Roane County ruled contrary to their position and sustained the defendants'

(Respondents herein) motion for judgment on the pleadings, plaintiffs below appealed the consolidated action to the Supreme Court of Appeals of the State of West Virginia. The result of this appeal was the opinion of the said Court set forth herein as "Appendix A" which sustained plaintiffs' position and adjudicated that the above quoted provisions of the Constitution and statutes of the State of West Virginia violated the Fourteenth Amendment to the Constitution of the United States and were therefore unenforceable and void.

When this decision was announced, the Respondents and Defendants Below, The Board of Education of the County of Roane, a corporation, John W. Stone, Charles Elba Robinson, H. D. Jones, Benjamin Hickel and John N. Cottle, members of the Board of Education of the County of Roane, and Mirrell Clark, Superintendent of Schools of Roane County, West Virginia, resolved not to proceed further with the defense of the action, they being satisfied with the results thereof. Thereupon your Petitioners, as citizens, voters and taxpayers of Roane County, moved to intervene as additional parties defendant to prosecute a motion for rehearing and if necessary a further proceeding by writ of certiorari to this Court. Your Petitioners were permitted to intervene as additional parties defendant by order of said Court set forth herein as "Appendix B". After status as defendants was obtained, Petitioners' Motion for Rehearing on the merits was denied by order set forth herein as "Appendix C".

There were no factual issues raised in the pleadings by the original parties defendant. The case was presented for decision both to the Circuit Court of Roane County and to the Supreme Court of Appeals of the State of West

Virginia on the pure question of law involving the constitutionality and validity under the United States Constitution of the super-majority requirements of the Constitution and statutes of the State of West Virginia which are conditions precedent to the issuance of general obligation bonds and to the laying of tax levies in excess of the limitations prescribed by the Constitution and enabling statutes of the state. The Supreme Court of Appeals of the State of West Virginia held, in short, that the super-majority requirements above mentioned violated the equal protection clause of the Fourteenth Amendment as expounded by this Court in the famous "one person, one vote" decisions. It held, over the vigorous dissent of Judge Haymond, that the "one person, one vote" cases and the equal protection clause require that every election be decided by a simple majority; otherwise, every person who votes in the affirmative on a proposal which requires a super-majority for passage is discriminated against by the "unlawful weighting" or "dilution" of his vote (see "Appendix A").

REASONS FOR GRANTING WRIT

1. The decision below constitutes a case of first impression in the nation and has decided a Federal question of immense significance not heretofore determined by this Court.

So far as Petitioners can ascertain no Court in history has ever before decided that equal protection of the laws means majority rule—neither this Court nor any State Court prior to the instant case. This case, of course, has attracted national attention, among bond counsel particularly. The bond market as it pertains to municipal bonds is in a state of chaos as the result of this decision in those many states which have had for many years re-

quirements of a super-majority for passage of proposals involving bonded indebtedness or taxation for special purposes. The impact of this case upon the fiscal affairs of various states and their political subdivisions is probably greater than the economic impact of any case which has been presented to this Court for decision in recent history, involving, as it does, multiple millions of dollars of public indebtedness throughout the nation. The issue cannot be resolved and the Fourteenth Amendment to the Constitution of the United States cannot be interpreted with finality except by this Court. Until this question is ultimately resolved the market for general obligation bonds of political subdivisions will not exist, and the validity of tax levies for special purposes will remain in doubt, in all of the states which have the super-majority requirements similar to those involved in this action. Petitioners believe that the Federal question presented here has economic significance of such immensity that it is impossible to be overstated.

2. The decision below was based upon the various "one person, one vote" decisions of this Court which are utterly inapplicable to the question presented.

The record plainly shows, and the lower Court recognized, that no element of discrimination existed in the Special Election held in Roane County, West Virginia; that is, that no voter was denied the right to vote by reason of race, creed, color, sex, wealth, ownership of property, marital status, place of residence or any other discriminatory factor. Every voter in the county had equal access to the polls, equal opportunity to vote, and the vote of every voter was counted as one vote. The lower Court relied upon the "one person, one vote" decisions of this Court, beginning with the case of *Baker* v. *Carr*,

369 *U. S.* 186, 82 *S.Ct.* 691, 7 *L. Ed. 2d* 663, and followed by the cases of *Gray* v. *Sanders,* 372 *U. S.* 368, 83 *S. Ct.* 801, 9 *L. Ed. 2d* 821; *Wesberry* v. *Sanders,* 376 *U. S.* 1, 84 *S. Ct.* 526, 11 *L. Ed. 2d* 481; *Reynolds* v. *Sims,* 377 *U.S.* 533, 84 *S. Ct.* 1362, 12 *L. Ed. 2d* 506; *Harper* v. *Virginia Board of Elections,* 383 *U. S.* 663, 86 *S. Ct.* 1079, 16 *L. Ed. 2d* 169; *Kramer* v. *Union Free School District No. 15,* 395 *U. S.* 621; 89 *S. Ct.* 1886, 23 *L. Ed. 2d* 583; and *Cipriano* v. *City of Houma,* 395 *U.S.* 701, 89 *S. Ct.* 1897, 23 *L. Ed. 2d* 647.

None of these cases involved questions even remotely similar to the question here presented. In our case there is no classification of voters, no weighting of votes determined by place of residence, and no denial of the franchise to be determined by property ownership or any other factor. The lower Court concluded that the 60 per cent requirement, the super-majority requirement, in and of itself, resulted in discrimination, or, as it more improperly stated, resulted in "weighting" or "dilution" of the "value" of an affirmative vote as contrasted with the "value" of a negative vote.

To reach this untenable position, the Court below was forced to assume the very question it was asked to decide. It was forced to beg the question in classic style. Before it could have concluded that the 60 per cent requirement violated the equal protection clause it first had to assume that a simple majority was essential to compliance therewith. Neither law, nor precedent, nor logic, can be employed to support this result.

The "one person, one vote" decisions mean, we submit, that every qualified voter must have an equal right to participate with every other qualified voter in the constitutionally guaranteed processes of our representative

democracy. None of the principles announced in any of those cases was violated in the instant case. The vote of every voter was counted as one vote in totaling the number of votes cast in the election and in determining the result thereof.

The constitutional and statutory provisions herein involved do not even operate directly upon the voters, but rather upon the political subdivisions of the State of West Virginia. Under these provisions the only thing "discriminated against" or "diluted" is the power of a political subdivision and its elected officials to incur indebtedness or raise taxes for specified purposes without consent of the voters. There is no constitutional right in any political subdivision to borrow money.

The people of the State of West Virginia in adopting the constitutional provisions in question, were making a justifiable effort to protect the fiscal integrity of the political subdivisions of the state and to protect themselves as voters and taxpayers from unwise expenditures of huge sums of their money to be collected by taxation. Even if we were to concede that these constitutional and statutory provisions do effect a classification of voters, or partial disenfranchisement, which we deny (proponents of one bond issue might be opponents of the next), it is obvious that the provisions were adopted to protect an overriding public interest of paramount importance.

The voters of Roane County, at the special election in question, were engaged directly in the legislative process. They were voting on the question of whether or not to change existing laws pertaining to taxation in their county. If "equal protection of the laws" means "majority rule" in the determination of questions of public policy submitted to the people for decision, who then act

as legislators, the same principle must apply to the actions of the representatives of the people engaged in the legislative process. Such a conclusion seems inescapable and it would require the internal reorganization (not the reconstitution) of every state legislature by judicial action. The ruling of the Court below has implications which are not only monumental in scope, but revolutionary in concept. These implications were recognized, and an opposite conclusion was reached, by the Supreme Court of the State of Idaho, in the case of Bogert v. Kinzer, case No. 10,446, opinion filed February 17, 1970. That Court held that a two-thirds voting requirement does not result in discrimination and does not violate the Fourteenth Amendment.

CONCLUSION

For these reasons, the writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Appeals of the State of West Virginia.

Respectfully submitted this 26th day of February, 1970.

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Spencer, West Virginia 25276

Attorney for Petitioners
and Intervening Defendants

APPENDICES

APPENDIX A

OPINION OF THE WEST VIRGINIA SUPREME COURT OF APPEALS

GRANVILLE H. LANCE *et al*

v.

THE BOARD OF EDUCATION OF COUNTY OF ROANE, ETC., JOHN W. STONE, *et al.*, MEMBERS, AND MIRRELL CLARK, Superintendent of Schools of Roane County, West Virginia.

No. 12809.

SUPREME COURT OF APPEALS OF WEST VIRGINIA.

Submitted May 7, 1969.

Decided July 8, 1969.

Dissenting Opinion July 31, 1969.

On Rehearing Nov. 11, 1969.

Further Rehearing Denied Dec. 2, 1969.

Syllabus by the Court

1. In a civil action in which the plaintiffs allege that the weight and force of their votes in a public election, and the votes of other persons similarly situated, are debased or diluted when considered in relation to the votes of other persons voting in such election, in violation of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States, there is thereby presented a justiciable issue, cognizable by the courts, upon which the plaintiffs are entitled to a judicial decision.

2. The Constitution of the United States, and the treaties and laws of the United States made in pursuance thereof, constitute the supreme law of the land

and the judges in every state are bound thereby. When a provision of the Constitution of West Virginia or of a statute enacted by the Legislature of this state is contrary to and in violation of a provision of the Constitution of the United States, the latter provision must be regarded as paramount and must prevail; and in a case properly presenting such a conflict, it is the right and duty of this Court to declare the provisions of the state statute or the provision of the state constitution to be unconstitutional and unenforceable.

3. The three-fifths vote requirement of Article X, Section 8 of the Constitution of West Virginia and of Sections 4 and 14 of Article 1, Chapter 13, Code, 1931, as amended, and the sixty percent vote requirement of Article X, Section 1 of the Constitution of West Virginia and of Section 16 of Article 8, Chapter 11, Code, 1931, as amended, are in conflict with and violative of the Equal Protection Clause of the Constitution of the United States and are therefore unconstitutional and unenforceable.

Lively & Francis, J. Henry Francis, Jr., Charleston, McClintic, James, Wise & Robinson, Charles C. Wise, Jr., Charleston, for appellants.

Jackson, Kelly, Holt & O'Farrell, William T. O'Farrell, Charleston, George M. Scott, Spencer, for intervenors as parties defendant.

CALHOUN, Judge:

This case, on appeal from a final judgment of the Circuit Court of Roane County, involves two declaratory judgment actions instituted in that court pursuant to Article 13, Chapter 55, Code, 1931, as amended, and

Rule 57 of the Rules of Civil Procedure, by Granville H. Lance, Fred Hill, Chester C. Dodd, Jr., Brady D. Hickel, Jr., and Joe A. Craddock, as plaintiffs, against the Board of Education of Roane County, a corporation, the individual members of that body and Mirrell Clark, Superintendent of Schools of Roane County, West Virginia, as defendants. Inasmuch as the two actions involve identical parties plaintiff, identical parties defendant, and similar or identical legal questions, they were consolidated in the trial court for hearing and for decision. In this Court, for the sake of brevity and clarity, the parties will be referred to as plaintiffs and as defendants in accordance with their designation in the civil actions in the trial court.

In one action, the plaintiffs challenge the validity of the three-fifths vote requirement of Article X, Section 8 of the Constitution of West Virginia and Sections 4 and 14 of Article 1, Chapter 13, Code, 1931, as amended, dealing with elections held by political subdivisions of the state for determination whether bond indebtedness shall be incurred. In the other action, the plaintiffs challenge the validity of the sixty percent vote requirement provided by Article X, Section 1 of the Constitution of West Virginia, commonly referred to as the Tax Limitation Amendment, relating to elections to authorize local tax levying bodies to make additional levies for tax purposes in excess of the levies provided for in the Tax Limitation Amendment.

The plaintiffs contend that the constitutional and statutory provisions in question are invalid and unenforceable on the ground that they are in contravention of the Equal Protection Clause of the Fourteenth Amendment and the Guaranty Clause of Article IV, Section 4 of the Constitution of the United States.

By an order entered in the consolidated actions on November 22, 1968, the trial court sustained the defendants' motions for judgment on the pleadings made pursuant to Rule 12(c) of the Rules of Civil Procedure; held that the West Virginia constitutional and statutory provisions in question are constitutionally valid and enforceable; and directed that the complaints be dismissed and that the consolidated actions be stricken from the docket. From the final judgment of the trial court, the plaintiffs have been granted the appeal to this Court. After the appeal was granted, this Court granted to the plaintiffs leave to move to reverse the judgment of the trial court pursuant to Code, 1931, 58-5-25 and Rule IX of the Rules of this Court. In these circumstances, the case was submitted for decision by this Court upon the original record, upon typewritten briefs and upon oral argument of counsel.

The defendants, particularly the board of education, at a special election held on April 29, 1968, submitted to the voters of Roane County the question of issuing bonds in the amount of $1,830,000 for the purpose of alleviating the overcrowded condition of school classrooms and facilities, removing fire hazards, providing for more adequate and more modern vocational and educational facilities, and for the purpose of meeting the needs of disadvantaged children. At the same special election, there was submitted to the voters of the county a proposal for the laying of additional tax levies in excess of the regular authorized levies for a period of five years, a part of the proposed additional revenue to be used for current expenditures and a part for capital improvements. A canvass of the votes revealed that 2,887 or 51.55% of the total votes cast favored the issuance of

the bonds and 2,866 or 51.51% of the total votes cast were in favor of the additional levy.

Subsequently the plaintiffs appeared before the board of education in their own behalf and in behalf of other persons who had voted with the majority on the two issues and demanded that the board authorize the laying of the additional tax levies and the issuance and sale of the proposed bonds on the ground that the sixty percent vote requirements in the constitution and the statutes were invalid in that they denied to the plaintiffs and others similarly situated the equal protection of the laws guaranteed to them by the Fourteenth Amendment and the republican form of government guaranteed to every state by Article IV, Section 4 of the Constitution of the United States.

Upon the refusal of the board to grant these requests or demands, the plaintiffs instituted the two declaratory judgment actions in the Circuit Court of Roane County by which they requested that the court declare the sixty percent vote requirements in question to be unconstitutional and void; and, by way of affirmative relief, the plaintiffs prayed in one action that the court require the board of education to proceed to authorize the issuance of the proposed bonds, to take all necessary steps in accordance with law to effectuate the sale of the bonds, and to provide for the application of the proceeds of the sale thereof, in accordance with the board's original proposal submitted to the voters at the special election; and similarly, in the other action, the plaintiffs prayed that the board of education be required to proceed according to law to impose the additional levy in accordance with the expressed will of the majority of the voters who voted upon that issue at the special election.

An answer was filed to the complaint in each of the two actions but, we believe, they raise no material issue of fact. A decision of the case involves primarily the legal question whether the West Virginia constitutional and statutory provisions in question are in contravention of the Constitution of the United States and are therefore void and unenforceable; and also the question whether the case presents a justiciable controversy.

Article VI of the Constitution of the United States contains the following language: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Article I, Section 1 of the Constitution of West Virginia provides: "The State of West Virginia is, and shall remain, one of the United States of America. The Constitution of the United States of America, and the laws and treaties made in pursuance thereof, shall be the supreme law of the land." By that clear and unambiguous language of the constitution of this state, it is expressly recognized that if there be an inconsistency or conflict between a provision of the constitution of this state and a provision of the Constitution of the United States, the latter must be regarded as paramount, must prevail, and the former must yield. In Carrington v. Rash, 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed.2d 675, the Court held that a provision of the Constitution of the State of Texas was in conflict with the Equal Protection Clause of the Fourteenth Amendment and that the provision of the state constitution was therefore unconstitutional and invalid. Reynolds v. Sims, 377 U.S.

533, 84 S.Ct. 1362, 1393, 12 L.Ed.2d 506, 584, contains the following language: "When there is an unavoidable conflict between the Federal and a State Constitution, the Supremacy Clause of course controls." See also State ex rel. Witt v. State Canvassing Board, 78 N.M. 682, 437 P.2d 143. We consider it unquestionable that if a provision of the Constitution of West Virginia is in conflict or inconsistent with one or more provisions of the Constitution of the United States, it is both the right and duty of this Court, when such a case is presented, to declare the provision of the state constitution to be invalid and unenforceable.

It is not questioned that the declaratory judgment actions were proper proceedings by which to require a judicial declaration of the rights of the parties in relation to the controversy in this case. This case presents an actual controversy and one which is justiciable within the intent and purpose of the declaratory judgment laws of this state. In a number of cases, this Court has held that the constitutionality of a legislative enactment may be determined in a civil action instituted pursuant to the statute and court rules of this state pertaining to declaratory judgments. Nuckols v. Athey, 149 W.Va. 40, pt. 2 syl. 138 S.E.2d 344.

In the present case, the plaintiffs assert that the effect of the sixty percent vote requirements in question is to debase or dilute the weight or force of an affirmative vote when considered in relation to the weight or force of a negative vote. More specifically, the plaintiffs contend that a negative vote has one and one-half the force of an affirmative vote and that, therefore, two negative votes have the force of three affirmative votes. Article 2, Section 4 of the Constitution of West Virginia provides: "Every citizen shall be entitled to equal repre-

sentation in the government, * * *." In referring to and applying that constitutional provision, the Court made the following statement in State ex rel. Smith v. Gore, 150 W.Va. 71, 75, 143 S.E.2d 791, 794: "That constitutional provision is clear and unambiguous in its meaning. It provides that every citizen shall have equal representation in government." The provision of our state constitution quoted immediately above is similar in its purpose to that of the Equal Protection provision of the Constitution of the United States. The West Virginia constitutional and statutory provisions for the holding of elections by which voters may determine whether bonds shall be issued and whether extra levies of taxes shall be made represent some of the very few instances in which the individual voter is permitted to have a direct and wholly effective voice in government. The two issues submitted to the will of the voters in the special election in Roane County involve the question whether taxes shall be collected to meet the extra levies and to retire the bonds. The voters were thereby also permitted to voice their sentiments and their views on the question of improved public schools and public school facilities for the county as a basic aspect of government.

As we have stated previously, the plaintiffs, speaking in behalf of themselves and all other voters who voted with the majority in the special election, assert that, by the debasement and dilution of their affirmative votes when considered in relation to the negative votes, they have been denied their rights under the Equal Protection provision of the Fourteenth Amendment of the Constitution of the United States. It is now clear, we believe, that such an assertion presents a justiciable question, cognizable by the courts, and not a mere political question.

Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663, involved a declaratory judgment proceeding instituted in a United States District Court in Tennessee by certain voters qualified to vote for members of the General Assembly of Tennessee, in their own behalf and in behalf of other voters similarly situated, alleging that, by reason of a certain Tennessee statute, seats in the general assembly were arbitrarily and capriciously apportioned in such a manner as to dilute or debase the votes of the complaining voters, thereby denying to them their constitutional rights to equal protection of the laws under the Fourteenth Amendment. The Court held that the allegations of the denial of equal protection of the law, in the circumstances of the case, presented a justiciable cause of action upon which the complaining voters were entitled to a trial and a judicial decision. In the concluding portion of the opinion, the Court stated: "We conclude that the complaint's allegations of a denial of equal protection present a justiciable constitutional cause of action upon which appellants are entitled to a trial and a decision. The right asserted is within the reach of judicial protection under the Fourteenth Amendment." The decision of the Court in this respect has been adhered to and reaffirmed in subsequent cases including Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 and Wesberry v. Sanders, 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed. 2d 481. See also Armentrout v. Schooler, 409 S.W.2d 138 (Mo.1966).

In relation to the problems existing in Roane County in connection with the public school system, the plaintiffs have made the following allegations in their complaints:

> "There have been no new schools or major additions or improvements to existing schools in Roane County since 1946 when the voters authorized the

issuance of $5,000,000 bonds for such purpose. Since that time only minor improvements have been made to existing facilities, the outlays for such improvements averaging less than 4% of the annual budget for current expenditures. As a consequence the schools in the county have become old and inadequate for modern educational needs. There are an average of 31.2 pupils per elementary classroom and 25.5 pupils per secondary classroom in 1966-1967 compared with the state average of 28 pupils per elementary classroom and 23.6 pupils per secondary classroom. Many of the classrooms and other facilities are makeshift in nature resulting from efforts to adapt old facilities to existing needs. Dangerous conditions have been created by the deterioration of many of the school structures. At least two major schools within the county, Spencer Elementary School and Spencer High School, have serious fire hazards which have resulted in orders from the State Fire Marshall and the State Superintendent of Schools closing certain parts of the facilities, prohibiting their further use until the conditions have been corrected and eliminated."

The plaintiffs further allege in their complaints that during the years 1964 to 1968, inclusive, six proposals of excess levies or bond issues for public school purposes have been submitted by the county board of education for approval of the voters of Roane County at elections held for that purpose and that in all instances the proposals received majorities of affirmative votes, which majorities ranged from 51.51% to 55.84%, but that in each instance the proposal was rejected because of a failure of the proposal to receive affirmative votes totaling at least sixty percent of the total number of votes cast. It is manifest, therefore, that there exists in this connection in Roane County a genuine controversy between the plaintiffs and the defendants and that it is a

controversy of quite considerable magnitude and importance.

Pertinent cases which followed Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663, developed the "one person, one vote" concept. This concept was enunciated in Gray v. Sanders, 372 U.S. 368, 83 S.Ct. 801, 9 L.Ed.2d 821. In the *Gray* case, the Court held that the Georgia county unit system was unconstitutional. The case involved a declaratory judgment proceeding instituted to determine the validity of the county unit system as a method of nominating candidates for statewide offices and for United States Senators in Democratic primary elections. The *Gray* case is strictly a "voting" case; it has nothing to do with reapportionment, redistricting, or the composition of State or federal legislatures. The Court held that the system impaired the right to vote of certain citizens and, therefore, denied those citizens the equal protection of the law guaranteed by the Fourteenth Amendment. In the *Gray* opinion the Court stated (372 U.S. at 380-381, 83 S.Ct. at 808-809):

> *"The only weighting of votes sanctioned by the Constitution* concerns matters of representation, such as the allocation of Senators irrespective of population and the use of the electoral college in the choice of a President. * * *. *But once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded.*
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> *The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote."* (Italics supplied.)

The next case in point was Wesberry v. Sanders, 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481. This case involved the apportionment of congressional districts in Georgia. The appellants claimed debasement and dilution of their rights to vote because of the state's existing apportionment system and because of the failure of the state legislature to realign the state's congressional districts more nearly to equalize the population of each district. The Court held that an apportionment of congressional seats which "contracts the value of some votes and expands that of others" was unconstitutional. The Court, in applying the principles of the earlier *Gray* case, concluded that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." (376 U.S. at 8, 84 S.Ct. at 530).

With the *Baker, Gray,* and *Wesberry* cases as precedents, the Court, in Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506, considered the question whether the existing apportionment system of the Alabama State Legislature was valid despite the fact that it was not apportioned on a population basis. The Court there held that there was a federal constitutional requirement that state legislatures be apportioned on a population basis.

The plaintiffs' position in this case is based upon the impairment of their rights to vote which are personal and individual rights. We believe that the following language from the *Reynolds* case (377 U.S. at 555, 84 S.Ct. at 1378) has a significant bearing on the legal questions raised in the present case: "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. *And*

the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." (Italics supplied.)

In a recent decision, Kramer v. Union Free School District No. 15, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583, announced June 16, 1969, the Court held a provision of the New York Education Law to be unconstitutional because it excluded from the electorate in school district elections certain voters who were otherwise eligible to vote in state and federal elections. The Court quoted with approval the following language from Harper v. Virginia Board of Elections, 383 U.S. 663, 655, 86 S.Ct. 1079, 1081, 16 L.Ed.2d 169: "once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."

It is true that the "one person, one vote" principle has been applied by the Supreme Court of the United States primarily in reapportionment cases which involved the rights of voters to vote in elections for nomination or election of public officials. However, the "one person, one vote" principle has been stated in general terms and without qualification under the Equal Protection Clause. The application of that general principle has not, to our knowledge, been denied in any other area of voting in public elections.

Cipriano v. City of Houma, 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647, announced June 16, 1969, dealt with a Louisiana statute, enacted pursuant to a provision of the constitution of that state. The statute authorized elections to be held by municipalities for the purpose of permitting the voters to vote on the question of the issuance

of municipal bonds. The statute provided that bonds could be issued by a municipality only if approved by a majority in number and amount of "the property taxpayers qualified to vote". It was held in that case, in accordance with Kramer v. Union Free School District No. 15, *supra,* announced the same day, that the restriction of the right to vote to "the property taxpayers qualified to vote" violated the Equal Protection Clause of the Fourteenth Amendment and that, in this respect, the statute was unconstitutional and invalid. We deem this decision in point because it dealt with a local election and the rights of voters in an election dealing with the issuance of municipal bonds as distinguished from an election to nominate or elect public officials.

State ex rel. Witt v. State Canvassing Board, 78 N.M. 682, 437 P.2d 143, a 1968 case, involved the validity of a provision of the state constitution which required that any amendment of the constitution proposed by the legislature be ratified by "a vote of the people of this state in an election at which at least three-fourths of the electors voting in the whole state, and at least two-thirds of those voting in each county in the state, shall vote for such amendment." The proposed amendment which was submitted to the voters at the election in question received a percentage of 81.1851 favorable votes on a statewide basis. In one county, however, fewer than a majority of the voters favored the proposal and, in twelve counties, fewer than two-thirds of the voters approved it. As a consequence, a minority of the voters of the state who resided in the thirteen counties in which the proposed amendment did not receive two-thirds approval prevailed over the expressed will of more than eighty-one percent of the voters on a statewide basis. That case is analogous to the present case in that it did not relate to the right

to vote for representatives in government but rather to the right of the voter at an election involving an issue directly related to government. The Supreme Court of New Mexico, relying upon the "one person, one vote" principle, held that this legal principle, established pursuant to the Equal Protection Clause, could not in reason and logic be restricted to the mere right to vote for representatives in government, and declared to be invalid the constitutional requirement of a two-thirds favorable vote in each county of the state. Having done so, the court did not consider the validity of the requirement of a favorable vote by at least three-fourths of the persons voting on a statewide basis. That issue was moot for the reason that the proposal received more than eighty-one percent of favorable votes on a statewide basis. In that case the court stated (437 P.2d at 149):

> "We see no escape from the conclusion that a requirement of a two-thirds favorable vote in every county, when there is a wide disparity in population among counties, must result in *greatly disproportionate values to votes* in the different counties. Where, as here, a vote in Harding County outweighs a hundred votes in Bernalillo County, the 'one person, one vote' concept announced in Gray v. Sanders, supra, certainly is not met." (Italics supplied.)

It is asserted by counsel for the defendants that the Constitution of the United States contains many provisions which are repugnant to the idea of majority rule, including a provision that ratification of treaties requires a concurrence of two-thirds of the senators present and voting, requirements pertaining to amendment of the Constitution, and provisions relating to overriding a veto of a bill by the president. We consider this contention frivolous and wholly beside the point. First, it could not reasonably be contended that a provision contained in

the Constitution is violative thereof. See Gray v. Sanders, 372 U.S. 368, 378, 83 S.Ct. 801, 9 L.Ed.2d 821. Second, we have concerned ourselves in this opinion only with the Equal Protection Clause which provides that no state shall "deny to any person" the equal protection of the laws. This constitutional provision imposes an inhibition upon each state for the protection of "any person" as an individual. It is an individual, personal right which is thus vouchsafed to "any person".

It is contended in behalf of the defendants that the Equal Protection Clause and the "one person, one vote" principle are not in point because this case merely involves the right of a state to require a sixty percent affirmative vote in elections which submit to the voters the issue of issuance of bonds or the issue of laying an excess levy for public school purposes. This, we believe, amounts to "arguing in circles" or an argument by circumlocution. It is a contention which begs the question. Its basis seems to be that this is an area in which the Equal Protection Clause cannot be binding upon the states. It is our view that we must first determine whether the sixty percent vote requirements violate the Equal Protection Clause and that, upon that basis, we must determine whether the state has the power to require the sixty percent affirmative vote.

We are of the opinion that the "one person, one vote" principle is now firmly established in broad general terms without qualification or exception. Certainly the right of the voter to equal protection, the right to protection against the dilution or debasement of the weight or force of an individual's vote, is fully as sound, sacred and important when he is voting on issues involving taxation, public revenue and the promotion of an adequate public

school system, as when he is voting for the nomination or election of a constable, a state senator, a governor or any other public official to represent the voter in government.

We are unwilling to concede that a determination of issues such as those involved in this case cannot be safely entrusted to a majority of the voters. There was no legal principle of which we are aware which required that the Constitution of West Virginia extend the right of the voter to express his will at the polls in the areas involved in the Roane County election in question in this case. The fact remains that our state constitution has extended the right of the voter into these areas; and when the voter was constitutionally granted the right to vote on these important issues, he thereby became guaranteed the equal protection of the law under the Fourteenth Amendment and the constitutional right to have his vote accorded the same weight, effect and force as that of any other person's vote, and thereby he became protected by the constitutional right to have the weight, force and effect of his vote not debased or diluted when considered in relation to the vote of any other person.

If the right of a voter can be legally diluted or debased by the sixty percent requirement, it would seem to follow necessarily that it could be further diluted or debased legally by a seventy-five or a ninety percent requirement. In other words, if the weight and force of a person's vote can be debased and diluted in accordance with the contention of the defendants in this case, we see no escape from the conclusion that the weight and force of such a vote may legally be debased and diluted virtually to the point of total extinction.

For reasons stated in this opinion, we are of the opinion, and accordingly the Court holds, that the three-fifths vote requirement of Article X, Section 8 of the Constitution of West Virginia and Sections 4 and 14 of Article 1, Chapter 13, Code, 1931, as amended, and also the sixty percent requirement of Article X, Section 1 of the Constitution of West Virginia and Section 16 of Article 8, Chapter 11, Code, 1931, as amended, are in conflict with and violative of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States and that, therefore, such provisions are void and unenforceable. In these circumstances, it is unnecessary for us to decide whether the sixty percent vote requirements in question are violative of the Guaranty Clause of Article IV, Section 4, of the Constitution of the United States.

The motion of the plaintiffs to reverse the judgment of the Circuit Court of Roane County is granted, the judgment is therefore reversed and the case is remanded to that court for such further proceedings as may be proper and consistent with the decision of the Court embodied in this opinion.

Motion to reverse granted.

HAYMOND, President (dissenting):

I am amazed, shocked and deeply distressed at the unprecedented and constitutionally unauthorized decision of the majority of this Court in this proceeding by which it undertakes to invalidate certain statutory provisions and two provisions of Sections 1 and 8, Article X of the Constitution of this State. By my oath of office as a Judge of this Court, which I consider binding in conscience, I swore to support, not to invalidate, the Constitution of

this State and, with all the sincerity at my command and upon grounds and for reasons to be stated in this dissent, I dissent from the decision of the majority. It should be clearly understood that in expressing my dissentient views, however, in this honest and sincere disagreement between my associates and me, my criticisms are directed, not to them, but to their decision.

With respect to the sanctity of an official oath to support a Constitution, the great Chief Justice, John Marshall, in the landmark case of Marbury v. Madison, 5 U.S. (1 Cranch) 137, at page 178, 2 L.Ed. 60, used this language: "Why otherwise does it [the United States Constitution] direct the judges to take an oath to support it? This oath certainly applies in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments and the knowing instruments, for violating what they swear to support!" Though these remarks were directed to the oath to support the Constitution of the United States they are applicable to an oath to support the Constitution of this State.

The Constitution of West Virginia is the fundamental, organic law of this State. It was made by the sovereign people of West Virginia and by them alone; and only the people of West Virginia, not this Court, can unmake that Constitution. It, and it alone, creates, maintains and preserves this State as a sovereign governmental entity and without it, intact and unimpaired in all its parts, this State can not exist or function as a sovereign governmental entity. All the departments and offices of the State Government of West Virginia, including its executive, its legislative and its judicial branches, are created by that Constitution and the power and the authority, in

their entirety, which any of them possesses are derived solely from that Constitution and from no other source. That Constitution is equally binding on all the political subdivisions of the State and upon its courts, and every officer and every citizen within its territorial limits.

To say that this Court, the creature of the Constitution from which it derives all the power and the authority which it possesses, may invalidate that Constitution or any of its provisions, is incredible beyond my power of belief and any such utterance does not make sense to me.

That this Court is without authority to invalidate the Constitution of this State or any of its provisions is clear to me beyond question. Manifestly it derives no such power from the Constitution of this State or from any agency of the Federal Government. On the contrary, such power is denied it by express provisions of the Constitution. The people of this State, and they alone, possess that power to the exclusion of all governmental instrumentalities of the State.

Article IV, Section 5 of the Constitution of this State provides that every person elected or appointed to any office, before proceeding to exercise the authority or to discharge the duties of such office shall make oath or affirmation that he will support the Constitution of the United States and the Constitution of this State, and that he will faithfully discharge the duties of the office to the best of his skill and judgment. Under that provision any vote or act of any officer of this State, including all its judges, which operates to invalidate the Constitution or any of its provisions is ineffective and of no force or effect.

That no judge or other officer of this State can act as such in any manner to invalidate or nullify, change or

amend any provision of the Constitution of this State is manifest by Sections 1 and 2, Article XIV of the Constitution by which the people reserve to themselves the exclusive right and power to alter or amend the Constitution and provide the manner in which any alteration or amendment shall be made. Those methods, which are exclusive, are ratification by a majority vote of the people of this State, at an election for the purpose, of acts or ordinances of a Constitutional Convention created in the manner provided by the Constitution and submitted to the people, and ratification by a majority vote of the people of this State, at an election for the purpose, of any amendment proposed by the Legislature. The action of the majority in undertaking to invalidate the constitutional provisions here under consideration is contrary to and violative of the constitutional provisions to which I have referred, and all such action is null and void and of no force or effect for that reason alone.

That this Court is without authority to invalidate any provision of the Constitution of this State is also indicated by the historical record that no judge of this Court in any of the more than 13,000 cases that have been decided by it during the period of 106 years of its existence has ever voted or acted to invalidate any provision of the Constitution of this State; and until the present decision in this case none of the total number of fifty judges of this Court during its entire period of existence has ever engaged in or taken such action.

To the contrary, this Court in its prior decisions has uniformly held that this Court does not have the power to amend, alter or repeal any provision of the Constitution of this State and that the provisions of that Constitution are binding upon all departments of government of

this State, all its citizens, and all persons whomsoever within its jurisdiction.

In the recent case of State ex rel. Smith v. Gore, 150 W.Va. 71, 143 S.E.2d 791, decided in 1965, an apportionment case, in which this Court unanimously and correctly held that representatives to a Constitutional Convention must be selected by voters on an equal population basis, the opinion written by Judge Caplan says: "A constitution is the fundamental law by which all people of the state are governed. It is the very genesis of government. Unlike ordinary legislation, a constitution is enacted by the people themselves in their sovereign capacity and is therefore the paramount law. This basic organic law can be altered or rewritten only in the manner provided for therein. Under the provisions of Article XIV of the West Virginia Constitution this can be accomplished by the legislature or by a convention. * * *. Each may formulate and present for a vote of the people proposed alterations of the constitution. In either case, until the people act such proposals have no force or effect of law."

In Re: Assessment of Shares of Stock of Kanawha Valley Bank, 144 W.Va. 346, 109 S.E.2d 649, the opinion prepared by Judge Browning, contains these pertinent statements: "This Court does not have the power to amend, alter, or repeal any provision of the Constitution of this State. That is a prerogative that the people have reserved unto themselves alone. It is within our power though, and our paramount duty, to prevent others from amending or repealing any part of the organic law of this State except in the manner provided in the document itself."

In Harbert v. County Court of Harrison County, 129 W.Va. 54, 39 S.E.2d 177, this Court, in a unanimous

opinion written by me said "The Constitution of this State is the supreme law of West Virginia; it is subject only to the Constitution of the United States and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made, under the authority of the United States, all of which constitute the supreme law of the land. United States Constitution, Article VI, Clause 2. The Constitution of West Virginia is binding upon all the departments of government of this State, all its officers, all its agencies, all its citizens, and all persons whomsoever within its jurisdiction. The three branches of our government, the legislative, the executive, and the judiciary, alike derive their existence from it; and all of them must exercise their power and authority under the Constitution solely and strictly in accordance with the will of the sovereign, the people of West Virginia, as expressed in that basic law. It is the solemn duty of this Court, its creature, to obey and give full force and effect to all its terms and provisions."

The majority has evidently overlooked or purposely ignored the quotations in the three above cited cases for it does not overrule or even mention any of them in its opinion in this case.

In the early case of List v. City of Wheeling, 7 W.Va. 501, in which Section 8, Article X of the Constitution of this State, one of the provisions here under consideration, was recognized and considered, this Court, in the opinion delivered by Alpheus F. Haymond, President, who was my grandfather and who had been a member of the Constitutional Convention of 1872, used this language: "The Constitution is the fundamental law of the state, in opposition to which any other law must be inoperative and

void." Of course, in that case the constitutional provision now under attack was without question recognized and considered to be valid, and its validity has been recognized in many subsequent decisions of this Court. See Berry v. Fox, 114 W.Va. 513, 172 S.E. 896; Bee v. City of Huntington, 114 W.Va. 40, 171 S.E. 539; Finlayson v. City of Shinnston, 113 W.Va. 434, 168 S.E. 479; Herold v. Townsend, 113 W.Va. 319, 169 S.E. 74.

In the *Berry* case, in which Article X, Section 1, of the Constitution of this State, known as the Tax Limitation Amendment of 1932, was considered by this Court, the majority opinion written by Judge Maxwell, states:

"The underlying purpose of written constitutions is that there may be a safe and definite harbor for the ship of state in times of tempest. Great tribulations of government do not arise in periods of administrative calm. They manifest themselves when the clouds are heavy. It is then that a constitution proves its worth in preserving for the people those fundamental principles of free government which are indispensable to the well-being of our democratic institutions.

"If organic law be subverted through expediency, the basic guaranties of liberty are thereby imperiled. This truth is recognized and stated in our Constitution itself in dignified and forceful phraseology:

" 'The provisions of the Constitution of the United States, and of this State, are operative alike in a period of war as in time of peace, and any departure therefrom, or violation thereof, under the plea of necessity, or any other plea, is subversive of good government, and tends to anarchy and despotism.' Sec. 3, Art. I, Const. W.Va."

As to the supremacy of the provisions of the Constitution of the United States, Chief Justice Marshall in Mar-

bury v. Madison, 5 U.S. (1 Cranch) 137, at page 175, 2 L.Ed. 60, used these pertinent words: "This original and supreme will organizes the government, and assigns to different departments their respective powers." which apply equally to the Constitution of this State.

In 4 M. J., Constitutional Law, Section 21, the text is in this language: "The Constitution of the United States was adopted by the whole people of the United States and is a grant of powers acquiesced in by the states themselves; hence, the constitution, and the laws passed by Congress in pursuance thereof, are the supreme law of the land. Next in order of supremacy come the state constitutions, the provisions of which are absolutely binding upon all the departments of the state government. The legislature has no power to pass laws in conflict with either state or federal constitutions. As has been said 'the constitution is law to the lawmakers.' "

With reference to the fundamental and basic character of a State Constitution and in discussing the well established and universal importance and effect of a State Constitution, the text in 16 Am.Jur.2d, Constitutional Law, Section 56, contains these pertinent statements:

"A written constitution is not only the direct and basic expression of the sovereign will, it is also the absolute rule of action and decision for all departments and offices of government with respect to all matters covered by it, and must control as it is written until it is changed by the authority which established it. No function of government can be discharged in disregard of or in opposition to the fundamental law. The state constitution is the mandate of a sovereign people to its servants and representatives. No one of them has a right to ignore or disregard its mandates, and the legislature, the executive

officers, and the judiciary cannot lawfully act beyond its limitations.

"The constitution of each state, so far as it is consistent with the provisions of the Federal Constitution, is the fundamental law of the state and a part of its supreme law, * * *.

"A state constitution is equally binding on the political subdivisions and courts of the state, and on every officer and every citizen. Any attempt to do that which is prescribed in any manner other than that prescribed or to do that which is prohibited is repugnant to that supreme and paramount law and is invalid."

To show the utter lack of authority and the palpable absurdity of the decision in this case. It is only necessary to envision the consequences of the present decision if it is a valid one, which I emphatically deny. The decision strikes down and nullifies provisions of the organic law which creates, maintains and preserves the government of this State which cannot exist and function effectively as a sovereign governmental entity if the integrity of the Constitution as a whole is impaired or destroyed. I submit that in the absence of a decision of the Supreme Court of the United States invalidating any part of the Constitution of this State, that Constitution can not be valid in part and invalid in part but that is the logical result of the holding in this case and that result, to me, is utterly unacceptable.

Furthermore, if the two provisions of the Constitution declared to be invalid by the present decision are, in fact, invalid, so also, in principle and in logic, are all other provisions of the Constitution which require a two-thirds or a three-fourths vote to accomplish the

intended result. There are a number of such provisions and all of them, in principle, under the holding of the majority, are invalid. Some, if not all, of these provisions are:

Section 9, Article IV, relating to impeachment of a state officer, states, in part, that "The senate shall have the sole power to try impeachments, and no person shall be convicted without the concurrence of two-thirds of the members elected thereto.";

Section 19, Article VI, relating to convening of the legislature by the governor, states, in part, that "It shall be his duty to convene it, on application in writing, of three-fifths of the members elected to each house.";

Section 22, Article VI, relating to legislative sessions, states, in part, that "During any thirty-day session the legislature shall consider no other business than the annual budget bill, except such as may be stated in a proclamation issued by the governor at least ten days prior to the convening of the session, or such business as may be stated by the legislature on its own motion in a concurrent resolution adopted by a two-thirds vote of the members elected to each house. All regular sessions may be extended by the concurrence of two-thirds of the members elected to each house.";

Section 29, Article VI, relating to requirement for reading bills, states, in part, that "No bill shall become a law, until it has been fully and distinctly read, on three different days, in each house, unless, in case of urgency, by a vote of four-fifths of the members present, taken by yeas and nays on each bill, this rule be dispensed with: * * *.";

Section 30, Article VI, relating to time acts take effect, states, in part, that "And no act of the legislature, * * *,

shall take effect until the expiration of ninety days after its passage, unless the legislature shall by a vote of two-thirds of the members elected to each house, taken by yeas and nays, otherwise direct.";

Section 7, Article X, relating to duties of county authorities in assessing taxes, states that "County authorities shall never assess taxes, in any one year, the aggregate of which shall exceed ninety-five cents per one hundred dollars valuation, except for the support of free schools; payment of indebtedness existing at the time of the adoption of this Constitution; and for the payment of any indebtedness with the interest thereon, created under the succeeding section, unless such assessment, with all questions involving the increase of such aggregate, shall have been submitted to the vote of the people of the county, and have received three-fifths of all the votes cast for and against it."; and

Section 2, Article XIV, relating to amendments of the Constitution, states, in part, that "Any amendment to the Constitution of the State may be proposed in either house of the Legislature; and if the same, being read on three separate days in each house, be agreed to on its third reading, by two thirds of the members elected thereto, the proposed amendment, with the yeas and nays thereon, shall be entered on the journals, * * *."

Moreover, if the decision of the majority in this proceeding is valid, and I again emphatically assert that it is not, the Constitution of this State, instead of being altered or amended by the people of this State by the exercise of their exclusive rights so to do, can be invalidated in any of its provisions if, in the opinion of three members of this Court, any such provision is, or provisions are, contrary to, in conflict with, or violative

of the Constitution of the United States. I submit that such result was not only never intended but was not even envisioned by the people of this State when they ratified the present Constitution, and that no such result was ever intended by the people of the United States when they ratified the Federal Constitution. Any such result violates the fundamental constitutional principle as stated by the great Chief Justice of the United States, John Marshall, in 1821, in Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, at page 389, 5 L.Ed. 257, in this language: "The people made the constitution, and the people can unmake it. It is the creature of their will, and lives only by their will." Though the Chief Justice was speaking of the Federal Constitution, his above quoted pronouncement directly applies to the Constitution of this State and the application of that principle prohibits absolutely any alteration, amendment, or action to invalidate the Constitution of this State by any agency of this State, for only the people themselves possess and can exercise that power.

With respect to the effect of the current decision, I am frank to say that notwithstanding my experience of more than a half century as a member of the legal profession and for more than a quarter century as a judge of a Circuit Court and of the Supreme Court of Appeals of this State, I never expected to see the day when any court of this State would formally undertake to declare unconstitutional any provision of the organic law of this State; and I feel that the great majority of the people of this State share my feeling of amazement, surprise and disbelief with respect to the present decision. Furthermore, I submit that those persons, few in number, who on television and by radio hailed the decision with expressions of delight and characterized

it as wonderful, when they realize the effect of the present decision upon the governmental structure of this State and upon the rights of the people under their Constitution, will be prone to change their expressions of delight to expressions of apprehension and alarm. I favor all possible and proper aid to education and, if I had been eligible to vote in Roane County, I would have voted to authorize the issuance of the bonds which a sufficient number of the voters of that county refused to authorize at the recent election; but I am unwilling to further the cause of education at the expense of destroying the integrity or impairing the validity of the fundamental law of this State.

The worst and most disturbing and disastrous feature of the present decision, in addition to its harmful effect upon the constitutional structure of this State, is the realization that if this Court has the power and authority to invalidate the two provisions of the Constitution here involved, it can, whenever it sees fit to do so, under the guise that they violate the Constitution of the United States, invalidate any other provision or all of the provisions of the Constitution and by so doing impair and destroy the integrity of the constitutional structure of this State. That it may never do so does not remove or set at rest the threat that it can exercise the power which according to the present decision it now possesses. I submit that those who framed and ratified the Constitution of the United States and the Constitutions of the various states of the Union never intended, or even imagined, that any court created by any of those Constitutions would ever claim to possess or exercise and usurp any such unlimited power.

Of course, as stated in the majority opinion, the provision of Article VI of the Constitution of the United States that "This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.", is the supreme law of the land. This provision, however, as I have demonstrated, has no application to the two constitutional provisions under consideration in this case. It is clear that no treaty relates to either of those constitutional provisions. It is equally clear that no law of the United States made pursuant to the Constitution which, of course, means acts or resolutions of Congress, as the Supreme Court does not make but instead interprets and declares the law, applies to or is inconsistent with either of such constitutional provisions. Whether the Supreme Court of the United States may invalidate the constitutional provisions in question is not involved and need not be considered in this proceeding, other than to say that it has not, in any reported case, declared such provisions to be unconstitutional. But conceding that the Supreme Court of the United States may declare such provisions unconstitutional, it does not follow that this Court can do so or can exercise any of the powers of that Court. Nor is either of the constitutional provisions inconsistent with or violative of any provision of the Constitution of the United States or of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States which is the constitutional provision on which the majority relies in reaching its conclusion in this proceeding.

That there is no conflict or inconsistency between the two constitutional provisions here involved and the Equal Protection Clause of the Fourteenth Amendment is clearly established by the existence of numerous similar provisions of the Constitution of the United States by which a two thirds vote or a three fourths vote is required to accomplish the intended and sought for result. Some, if not all, of these provisions in the Federal Constitution are:

Article I, Section 3, relating to impeachments, states, in part, that "And no Person shall be convicted without the Concurrence of two thirds of the Members present.";

Article I, Section 7, relating to the passage of bills and resolutions, states, in part, that "If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law."; and "Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary * * * shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.";

Article II, Section 2, relating to the powers of the President, states, in part. that "He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur;"; and

Article V, relating to Amendments to the Constitution, states, in part, that "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress;".

There is no conflict or inconsistency between the above quoted constitutional provisions and the Equal Protection Clause of the Fourteenth Amendment and all such provisions are, of course, valid and effective. I submit that if there is no conflict or inconsistency between such provisions of the Federal Constitution and the Equal Protection Clause, and no court has ever indicated that there is any such conflict or inconsistency, it necessarily follows that there is no inconsistency between the Equal Protection Clause and the two constitutional provisions here involved and the other provisions of the Constitution of this State which are similar to the quoted provisions of the Constitution of the United States, all of which require more than a majority vote to resolve a particular question in the accomplishment of the intended result. In the absence of any such conflict or inconsistency, the two constitutional provisions are not unconstitutional as violative of any provision of the Constitution of the United States or the Amendments to it and in consequence can not be validly held to be unconstitutional by any decision of this Court. It is impossible for me to understand how provisions of the Constitution

of this State which are similar or identical with valid provisions of the Constitution of the United States can be held to be unconstitutional as violative of that Constitution. There is no presumption or determination of the unconstitutionality of those provisions in the absence of a decision of the Supreme Court of the United States holding such provisions to be unconstitutional as violative of the provisions of the Constitution of the United States or the Due Process and Equal Protection Clauses of the Fourteenth Amendment and, as heretofore stated, there has been no such decision of the Supreme Court of the United States or any decision by it which can reasonably be construed to apply to and render unconstitutional the two constitutional provisions involved in this case.

The contention that no conflict or inconsistency exists between the two constitutional provisions in question and the Equal Protection Clause was presented and urged upon this Court in the argument of this case but was summarily dismissed, without adequate study or consideration, as "frivilous and wholly beside the point." Such action was unfortunate. The contention deserved a kinder fate and if it had been properly considered would, or, at least, should have prevented the erroneous and unfortunate decision in this case. The analogies between the two constitutional provisions in question and other provisions of the Constitution of this State and similar provisions of the Constitution of the United States which require more than a majority vote to accomplish the intended result are not mentioned or presented as a challenge to the constitutionality of those provisions in the Federal Constitution, which, of course, can not be seriously asserted but are mentioned to show that as those provisions are constitutional and valid, similar provisions

in the Constitution of this State are likewise constitutional and valid. And this issue was not even considered by the majority.

As the two constitutional provisions in question are not violative of the Equal Protection Clause or of any provision of the Federal Constitution, the provisions of the supremacy clause of that Constitution that the judges in every state shall be bound by that Constitution, do not authorize or empower this Court in the first instance to invalidate either of the two constitutional provisions. The meaning and the effect of that provision of the supremacy clause are that if a provision of the Constitution of any State is clearly violative of the Federal Constitution and such violation has been determined by a court of competent jurisdiction or such provision has been invalidated by any treaty or law of the United States or by any amendment to the Federal Constitution, the judges of such State shall, of course, adhere to and follow the Federal Constitution and the laws made pursuant to it and the treaties made under the authority of the United States, and shall reject and refuse to recognize as valid the Constitution and the laws of any State found to be in conflict with the supremacy clause. To do that is one thing. It is an entirely different thing for the Supreme Court of a State, in the first instance and before the invalidity of a provision of a State Constitution has been determined as indicated, to invalidate the State Constitution which creates such court or any provision of such Constitution.

The basic error in the decision of the majority in this case is the view that the two constitutional provisions in question are inconsistent with and violate the recently promulgated doctrine or principle of one person-one vote developed and applied by the Supreme Court of the

United States in a series of cases beginning with Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed. 2d 663. In those cases the Court held that the courts have jurisdiction to determine the constitutionality of statutes which provide for the selection of legislators on the basis of unequal population apportionment, and has declared such statutes to be unconstitutional as violative of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, and that seats in the legislative branch of a state government much be apportioned substantially upon a population basis and that political equality means one person-one vote. Some of the leading cases are Gray v. Sanders, 372 U.S. 368, 83 S.Ct. 801, 9 L.Ed. 2d 821; Wesberry v. Sanders, 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481; Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d. 506; WMCA, Inc. v. Lomenzo, 377 U.S. 633, 84 S.Ct. 1418, 12 L. Ed. 2d 568; Maryland Committee for Fair Representation v. Tawes, 377 U.S. 656, 84 S.Ct. 1429, 12 L.Ed.2d 595; Davis v. Mann, 377 U.S. 678, 74 S.Ct. 1441, 12 L.Ed.2d 609; Roman v. Sincock, 377 U.S. 695, 84 S.Ct. 1449, 12 L.Ed. 2d 620; Lucas v. Forty-Fourth General Assembly of State of Colorado, 377 U.S. 713, 84 S.Ct. 1459, 12 I.Ed.2d 632; Hearne v. Smylie, 378 U.S. 563, 84 S.Ct. 1917, 12 L.Ed.2d 1036; Pinney v. Butterworth, 378 U.S. 564, 84 S.Ct. 1918, 12 L.Ed.2d 1037; and Hill v. Davis, 378 U.S. 565, 84 S.Ct. 1918, 12 L.Ed.2d 1037.

In fact and in law, and contrary to the view of the majority, the two constitutional provisions in question are not inconsistent with the one person-one vote principle and that principle was not disregarded or violated at the school bond election in Roane County in which the proponents of the additional levy and the bonds failed to obtain a vote of sixty per cent in favor of the levy and a

vote of three-fifths in favor of the bonds. The holdings in all the above cited cases, except Lucas v. Forty-Fourth General Assembly of State of Colorado, 377 U.S. 713, 84 S.Ct. 1459, 12 L.Ed.2d 632, involved the constitutionality of legislative apportionment schemes of plans adopted by several states of the Union, and such holdings are not applicable to the case at bar. In each of those cases the apportionment of seats in one or both houses of a state legislature was declared to be violative of the Equal Protection Clause of the Fourteenth Amendment on the ground that the apportionment on a population basis with respect to different political subdivisions of the state was unequal and that a person's right to vote for State legislators was unconstitutionally impaired when its weight was substantially debased or diluted in comparison with votes of citizens living in other subdivisions of the state.

In the *Reynolds* case, cited and relied upon by the majority, it appeared, among other conditions, that in certain senatorial districts and counties of the State of Alabama, under statutory enactments, population variance of ratios of up to about forty-one to one existed in the senate and up to about sixteen to one existed in the house; that in Bullock County with a population of 13,462 and Henry County with a population of only 15,286, each county was allocated two seats in the Alabama House, whereas Mobile County with a population of 314,301 was given only three representatives and Jefferson County with a population of 634,864 had only seven representatives, and there was a similar inequality in the senatorial apportionment. In that situation it was clear that the vote of the citizens of Mobile County with 314,301 people and of Jefferson County with 634,864, people was greatly outweighed and diluted in comparison with

the weight of the vote of the citizens of the smaller Counties of Bullock and Henry.

When the Court in those cases referred to the debasement of the right to vote caused by the malapportionment of the legislative apportionment plan it referred to a situation which did not exist in any respect in connection with the levy and the bond election vote under the constitutional provisions involved in this case. In that election there was no debasement or dilution of the vote of any voter who cast a vote for or against the levy or the bonds and no voters were disqualified. The question of apportionment on any population basis was not involved or considered and the requirement of one person-one vote was fully complied with and satisfied. Each voter in that election cast one vote and each vote so cast was counted as one vote for one voter. The only thing of which the plaintiffs in this proceeding can complain is that they and those associated with them who favored the authorization of the levy and the bonds did not get enough votes to win the election. The issue here involved is as simple as that and is the only issue involved. It is pertinent to observe, also, in all the cases cited, except the *Lucas* case, that the apportionment plan was created by statute and the validity of any constitutional provision of that kind was not involved. Of course, in those instances the Equal Protection Clause was violated but there was no such violation in connection with the levy and the bond election under the constitutional provisions that required a sixty per cent vote to authorize the levy and a three-fifths vote to authorize the issuance of the bonds.

In the *Gray* case, cited in the majority opinion, a legislative apportionment plan relating to the selection of state legislators of the State of Georgia, known as the

County-Unit System under which the votes of persons living in large counties were given no more weight than the weight given to fewer votes of persons living in small counties, was involved; and in the *Wesberry* case a state statutory apportionment plan, relating to the selection of congressmen in the State of Georgia, was likewise involved. In the *Wesberry* case the Court held that one man's vote in a congressional election must be worth as much as another's vote in such election. In short the one person-one vote principle was designed to secure equal representation on a population basis, and that question is not pertinent or involved in connection with the Roane County school bond election.

The rule of the above cited apportionment cases does not apply to or recognize any debasement or dilution of the votes of the citizens in each area among themselves and within that area, for the vote of each citizen in each area is of equal weight in the selection of their representatives. Accordingly, I repeat, those cases do not apply to the votes cast at the Roane County school bond election for the reason that no issue of apportionment with respect to the selection of any governmental representative on an unequal population basis, or no issue of the comparative value of the votes cast is involved. Each person who voted at that election cast one vote and that one vote was duly counted and was given the value of one vote of one person. The one person- one vote principle was complied with fully and the inability of those who failed to obtain enough votes to win the election was not due to any debasement or dilution of their vote but was due to the lack of enough affirmative votes to win the election. The votes cast by the individual voters were counted alike and all of them were of equal weight and value.

Furthermore, none of the apportionment cases produced or applied a formula like the formula conjured up by the plaintiffs and applied by the majority in this case by which a single negative vote at an election in which sixty per cent or three-fifths of the votes cast is required to win the election is given the weight or the value of one and one-half times a single affirmative vote or by which negative votes were evaluated on the basis that two minority votes were equal to three affirmative votes. By that formula one affirmative winning vote, even in an election in which only a majority vote is required to win and in which there are 5999 affirmative votes and 4000 negative votes or a total of 9999 votes, would be given the weight and value of one and one-half times one negative vote and two affirmative votes would be given the weight and value of three negative votes and, in consequence, the negative votes would be illegally debased and diluted to that extent. This hypothesis shows the utter unreliability of and the obviously fallacious result that could be accomplished by a formula that could invalidate any election whether conducted on a sixty per cent or a majority vote basis. By such a formula the unanimous vote requirement for a verdict of a jury could be invalidated because the vote of one dissenting juror can outweigh the combined votes of the other eleven jurors and the traditional unanimous consent rule could be abrogated because the vote of one dissenting member can outweigh the votes of all the other members. No decision of any court other than the decision in the case at bar, to my knowledge, has recognized or applied any such arbitrary or capricious method of evaluating votes in determining the result of an election.

The New Mexico case of State ex rel. Witt v. Canvassing Board, 78 N.M. 682, 437 P.2d 143, cited in the major-

ity opinion, was also an apportionment case and involved an apportionment of the votes of the citizens of the various counties of that state on a grossly unequal population basis in an election to amend a provision of the Constitution of that state. The court in that case applied the one person-one vote principle of the Federal apportionment cases to an election to amend a provision of the Constitution of that state and held that the constitutional requirement of a two thirds vote in each county to amend the provision of the Constitution of that state relating to the elective franchise, was violative of the one person-one vote principle and unconstitutional for that reason. That case is clearly inapplicable to the case at bar; but whatever may be the effect of the holding in that case, it is not binding authority on this Court and it is not even persuasive authority for me. It may be of interest to state, however, that the same New Mexico Court that decided the *Witt* case and invalidated a provision of the Constitution of that state, said, as I say in this case, that when a proposal to amend a Constitution to abolish a state office was defeated at the polls by the people, to sanction legislative repeal of that office, just as it is to sanction invalidation in that situation by a State court decision, would thwart the constitutional provision and defeat the will of the people as expressed at the polls. Thompson v. Legislative Audit Commission, 79 N.M. 693, 448 P.2d 799.

The majority opinion cites and relies on the cases of Carrington v. Rash, 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed.2d 675; Kramer v. Union Free School District No. 15, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583; and Cipriano v. City of Houma, 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647. Each of those cases is utterly inapplicable to the case at bar. In each of them a particular group of citizens

was excluded from the exercise of the elective franchise and in each case the Supreme Court of the United States held that the state constitutional provision or the statutory provision effecting such exclusion was invalid. It is perhaps unnecessary to point out further the inapplicability of any of those decisions to the case at bar but, to indicate the difficulty experienced by the majority in attempting to find a pertinent citation of authority on which to rest its unprecedented decision in this case, I shall show that none of those decisions has any present application.

The *Carrington* case dealt with a provision of the Constitution of the State of Texas which permitted a military serviceman to vote only in the county where he resided when he entered the service. The petitioner was a member of the armed services who had moved to Texas in 1962. He was a resident of and intended to make his home in that state. Under the foregoing constitutional provision he was denied the right to vote. The Supreme Court of Texas held that constitutional provision to be valid but on certiorari the Supreme Court of the United States reversed and held that though a state can impose reasonable residence requirements for voting, it can not, under the Equal Protection Clause deny a ballot to a bona fide resident merely because he is a member of the armed services. In the opinion the Court said: "We recognize that special problems may be involved in determining whether servicemen have actually acquired a new domicile in a State for franchise purposes. We emphasize that Texas is free to take reasonable and adequate steps, as have other States, to see that all applicants for the vote actually fulfill the requirements of bona fide residence. But this constitutional provision goes beyond such rules. * * *. All servicemen not resi-

dents of Texas before induction come within the provision's sweep. Not one of them can ever vote in Texas, no matter how long Texas may have been his true home. '[T]he uniform of our country * * * [must not] be the badge of disfranchisement for the man or woman who wears it.' " Manifestly the decision of the Supreme Court of the United States, not the Supreme Court of Texas, that the constitutional provision which disfranchises a particular group of citizens was unconstitutional, has no application whatsoever to the case at bar. No citizen who voted at the Roane County school bond election was disqualified from voting and why the *Carrington* case is cited by the majority is a mystery to me.

In the *Kramer* case a New York statute provided that three classes of persons were qualified, under the law of that state, to vote in school elections: (1) Parents or guardians of children attending public schools within the district; (2) persons who own taxable real property within the district, and their spouses; (3) persons who lease taxable real property within the district, and their spouses. The applicant in that case, a bachelor who lived with his parents and who neither owned nor leased any real estate within the district and, not being within any of the three classes, was disqualified from voting despite the fact that he met the general age and residence requirements imposed by state law. The court held the statute to be violative of the Equal Protection Clause of the Fourteenth Amendment and to be unconstitutional. For the reason indicated in connection with the *Carrington* case, the decision in the *Kramer* case is clearly inapplicable to the case at bar.

In the *Cipriano* case, a Louisiana statute permitted only "property taxpayers" to vote in elections called to

approve the issuance of revenue bonds by a municipal utility. This disqualifying statute was held to be unconstitutional not because it debased or diluted the vote of any person but because it arbitrarily disqualified a person from voting in a municipal bond election who was otherwise duly qualified to vote in other elections. The statute also disqualified 6926 other non-property taxpayers who were qualified voters in the City of Houma. The decision in this case closely resembles the *Kramer* case and is, for the same reason utterly inapplicable to the case at bar. This manifestly inapplicable decision was cited in the majority opinion for the unconvincing stated reason that "We deem this decision in point because it dealt with a local election and the rights of voters in an election dealing with the issuance of municipal bonds as distinguished from an election to nominate or elect public officials." I can detect not even a remote connection between the question of the authorization of an issue of municipal bonds at a local election and the applicability or the non-applicability of the one person-one vote principle in evaluating the votes cast at such an election and, as already indicated, that question was not involved or considered in the election dealt with in the *Cipriano* case.

The action of the majority of this Court, in glorifying and clothing with omnipotence a majority vote in any election and in proscribing any requirement of a two thirds or a three fourths vote to accomplish the intended result, shows a surprising lack of consideration of one of the fundamental functions or basic purposes of a written constitution for any governmental sovereign, whether such sovereign is the Nation or a State of the Union. That function or purpose is, of course, to protect the individual against the power of government and to safeguard the minority against the tyranny of the majority, which by

its power can generally achieve its political and governmental objectives, and to prevent the majority from usurping or destroying the rights of the minority. Such restraint upon the unlimited power of the majority is a salutary and essential restraint and is a valid constitutional limitation as evidenced by provisions of that nature in the Constitution of the United States and in every state Constitution.

The text in 16 Am.Jur.2d, Constitutional Law, Section 4, discusses these universally recognized characteristics of a written constitution in this language: "The term 'constitution' implies an instrument of a permanent and abiding nature. A constitution, unlike a statute, is intended not merely to meet existing conditions but also to govern the future. Although this characteristic of a written constitution may at times obstruct progress, its stability is intended to protect the people from frequent and violent fluctuations of public opinion, since the constitutions, state and federal, are limitations on the power of the people as against the impulses of mere majorities." Section 6 of the same authority, with respect to functions of constitutions generally, contains these statements: "Perhaps the most important of the fundamental functions of a constitution is to establish the basis of the governmental system, that is, to prescribe the permanent framework of the system of government, assign to the different departments their respective powers and duties, and establish certain fixed first principles on which government is founded."

By its unwarranted exaltation of the rule of the majority in this instance, the majority has reached an inconsistent and, to me, an intolerable result. In proclaiming the supremacy of the majority in the Roane County

school bond election, it has permitted five dissatisfied, defeated and frustrated citizens and taxpayers of that county who cast affirmative majority votes in that election, with the aid of this Court, to thwart, defeat, and overcome the express will of a majority of the voters of this State who, less than three years ago, by a vote of 212,883 to 206,542, or a majority of 6341 votes, at the state wide general election in 1966, refused to ratify an amendment which would have removed the three fifths vote requirement from the Constitution of this State. By its decision, the majority of this Court, contrary to the recently expressed will of the majority of the voters of this State, now invalidates the three fifths vote requirement of the Constitution in the name of the Equal Protection Clause of the Fourteenth Amendment. Of course, I can not sanction, subscribe to, or concur in any such result.

In recent years the Supreme Court of the United States has been widely criticized and charged with changing the Constitution of the United States by its interpretation of some of its provisions to give them a meaning not justified by the language of the Constitution. Now, unfortunately, for the first time, this Court, by the tortured and unwarranted application of the one person-one vote principle to a situation to which it clearly does not apply, and by invalidating clearly valid provisions of the fundamental law of this State which its people want retained in force and effect and are unwilling to change, becomes vulnerable to the same type of criticism. This I deeply regret and deplore.

At the expense of the invalidation of two provisions of the Constitution of this State and the threat of the invalidation of other provisions of that basic law, it can

now be truly said that it is hard and expensive to obtain an education in West Virginia. A much easier, less expensive, less hazardous and a more acceptable and orderly way to obtain such an education would be for the people of this State to amend these now invalid provisions of our State Constitution by their vote in the manner provided by Article XIV of that fundamental law. Until they are so amended or until in an election three fifths of the voters of a particular county express their wish for a bond issue or sixty per cent of the voters of such county express their wish for the additional tax levy, the minority of less than three fifths of the voters and sixty per cent of the voters in that area should not, in a free society, be forced to accept the tax burdens and to pay for such bonds. Instead they should be persuaded, as I think they can be, to authorize the levy and the bonds in accordance with the provisions of Article X, Sections 1 and 8, of the Constitution of this State.

I would affirm the judgment of the Circuit Court of Roane County and dismiss this consolidated action at the cost of the plaintiffs.

On Rehearing

CALHOUN, Judge.

On the rehearing of this consolidated action, heretofore granted for the limited purpose of considering the motion of A. T. Gordon and others for permission to intervene and be made parties defendant hereto, upon full consideration of the motion, as amended, such motion is sustained and the movants are permitted to intervene and to be made defendants to this consolidated action. The rehearing having been granted for the limited purpose of considering the motion to intervene, the Court refuses to reconsider or modify its holding on the merits and ac-

cordingly the final judgment rendered July 8, 1969, upon the merits, is reaffirmed without change or modification in any respect, other than to grant the motion, as amended, to permit the movants to intervene and to be made parties defendant to this consolidated action. Accordingly, the original opinion and the prefixed syllabus points are approved, adhered to and adopted as the decision of this Court in this proceeding and the judgment of the circuit court indicated in the original opinion is reversed and this action is remanded to that court.

Reversed and remanded.

HAYMOND, President (dissenting):

I concur in the action of the Court in granting the motion to intervene and in permitting the movants to be made defendants to this consolidated action but I dissent from the majority opinion on the rehearing of this action in refusing to reconsider or modify its holding on the merits and in affirming its final judgment of July 8, 1969, and I adopt, without change or modification, the dissenting opinion heretofore filed by me in this proceeding.

APPENDIX B

ORDER PERMITTING INTERVENTION OF PETITIONERS

GRANVILLE H. LANCE, ET AL.

No. 12809 v.

THE BOARD OF EDUCATION OF ROANE COUNTY, ETC., JOHN W. STONE, ET AL., members, and MIRRELL CLARK, Superintendent of Schools of Roane County, West Virginia

This consolidated action came on for hearing on this day upon the written motion of A. T. Gordon, George

Moffatt, V. E. Greenleaf, C. C. Conley, H. G. Everly, Roy R. Griffith, J. E. Oakley, Harlan H. Alvis, Carl Mace, C. Ray Keith, C. A. Parsons, Charles Hickman, Robert J. Knopp, Charles T. Knopp, Hubert Jones and A. D. Lupardus for leave to intervene as additional parties defendant and for rehearing, which motion was filed in the Office of the Clerk of this Court in vacation on August 6, 1969, upon the amendment to said motion and the affidavit of some of the intervenors in support of said amendment to said motion, which amendment and affidavit were duly filed herein on October 31, 1969, and upon the typewritten briefs and the oral argument in behalf of the movants, and upon the typewritten brief and the oral argument in behalf of the plaintiff in opposition to said motion to intervene as amended.

The rehearing having been granted for the limited purpose of considering the motion to permit the movants to intervene and be made additional parties defendant herein, and the motion for permission to intervene, as amended, having been submitted for decision, the Court, upon mature consideration of such motion, as amended, is of the opinion to, and does hereby sustain said motion, as amended, and it is accordingly adjudged and ordered that the movants, A. T. Gordon, George Moffatt, V. E. Greenleaf, C. C. Conley, H. G. Everly, Roy R. Griffith, J. E. Oakley, Harlan H. Alvis, Carl Mace, C. Ray Keith, C. A. Parsons, Charles Hickman, Robert J. Knopp, Charles T. Knopp, Hubert Jones and A. D. Lupardus, be and they are hereby permitted to intervene as parties defendant herein and they are hereby made parties defendant to this consolidated action.

The Court refuses at this time to reconsider or modify its holding herein on the merits and accordingly the final

judgment rendered on July 8, 1969, upon the merits, is reaffirmed without change or modification in any respect other than to grant the motion, as amended, to permit the above named movants to intervene and to be made parties defendant to this consolidated action.

Judge Haymond dissents and reserves the right to file a dissenting opinion.

APPENDIX C

ORDER DENYING MOTION FOR REHEARING

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 2d day of December, 1969, the following order was made and entered, to-wit:

GRANVILLE H. LANCE, ET AL. Plaintiffs Below, *Appellants*

12809 vs.

THE BOARD OF EDUCATION OF THE COUNTY OF ROANE, a corporation, JOHN W. STONE, ET AL., MEMBERS OF THE BOARD OF EDUCATION OF THE COUNTY OF ROANE, and MIRRELL CLARK, Superintendent of Schools of Roane County, West Virginia, Defendants Below, *Appellees*, A. T. GORDON, ET AL., *Intervenors as Parties Defendant*

This proceeding came on this day for consideration upon the order of this Court entered July 8, 1969, reversing the judgment of the Circuit Court of Roane County rendered November 22, 1968; upon the written opinion filed with the record wherein the Court held in

part that the three-fifths vote requirement of Article X, Section 8 of the Constitution of West Virginia and the sixty percent vote requirement of Article X, Section 1 of the Constitution of West Virginia are in conflict with and violative of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and are therefore unconstitutional and unenforceable; upon the motion of Judge Haymond, timely filed, for rehearing upon the Court's own motion; upon the motion of A. T. Gordon, George Moffatt, V. E. Greenleaf, C. C. Conley, H. G. Everly, Roy R. Griffith, J. E. Oakley, Harlan H. Alvis, Carl Mace, C. Roy Keith, C. A. Parsons, Charles Hickman, Robert J. Knopp, Charles T. Knopp, Hubert Jones and A. D. Lupardus for leave to intervene as parties defendant; upon the order of this Court entered October 3, 1969, granting a rehearing for the limited purpose of considering the motion for leave to intervene and setting the matter for hearing; upon the arguments and briefs of counsel thereon; upon the order of this Court entered November 10, 1969, and subsequent opinion, granting said motion to intervene and making said movants parties defendant herein; and upon the petition for rehearing and reargument filed by said intervenors as parties defendant on November 21, 1969, upon mature consideration of all of which a majority of the Court is of opinion to and doth deny the prayer of the petition for rehearing and reargument and doth order that the final order entered herein on July 8, 1969, be made absolute and certified as heretofore directed. Judge Haymond would grant.

A True Copy.

Attest: (George W. Singleton)
Clerk Supreme Court of Appeals

APPENDIX D

ORDER STAYING JUDGMENT PENDING FILING OF PETITION

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 8th day of December, 1969, the following order was made and entered, to-wit:

GRANVILLE H. LANCE, FRED HILL, CHESTER C. DODD, JR., BRADY D. HICKEL, JR., and JOE CRADDOCK, Plaintiffs Below, *Appellants*

12809 vs.

THE BOARD OF EDUCATION OF THE COUNTY OF ROANE, a corporation, JOHN W. STONE, ET AL., Members of the Board of Education of the County of Roane and MIRRELL CLARK, Superintendent of Schools of Roane County, West Virginia, Defendants Below, *Appellees*, A. T. GORDON, ET AL., Intervenors as Parties Defendant

On a former day, to-wit, December 4, 1969, came A. T. Gordon, and others, Intervenors as Parties Defendant, by George M. Scott, their attorney, and presented to the Court their motion in writing to stay the execution of the judgment of this Court entered on the 2d day of December, 1969 pending the filing of a petition for writ of certiorari with the United States Supreme Court and pending final action of that Court; and on December 5, 1969, came also the appellants, Granville H. Lance and others, by Lively, Francis & Hereford and J. Henry Francis, Jr., their attorneys, and presented to the Court their motion in writing to require the aforesaid Intervening Defendants to give Bond.

Upon consideration whereof, the Court is of opinion to and doth sustain said motion for stay, and the execution of the judgment of this Court rendered on the 2d day of December, 1969 is suspended for a period of ninety days from the adjournment of the present September, 1969 Term, but this stay shall not take effect until the petitioners or some person for them shall have given before the Clerk of the Circuit Court of Roane County bond with good personal security in the penalty of TWO HUNDRED Dollars, conditioned according to law; all of which is ordered to be certified to the Circuit Court of Roane County.

A True Copy

Attest: (George W. Singleton)
Clerk Supreme Court of Appeals

No. 1244

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

A. T. GORDON, ET AL.,
Petitioners and
Intervening Defendants Below,

VS.

GRANVILLE H. LANCE, ET AL.,
Respondents and
Plaintiffs Below,

AND

THE BOARD OF EDUCATION OF THE COUNTY OF ROANE, *a corporation,* ET AL.,
Respondents and
Defendants Below.

BRIEF OF RESPONDENTS, GRANVILLE H. LANCE, ET AL., IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

REASONS FOR DENYING PETITION

ARGUMENT

The West Virginia Supreme Court of Appeals correctly applied to this voting case the Equal Protection Clause and the principles established thereunder by this Court and held that the votes of the respondents herein had been unconstitutionally debased or diluted.

Shorn of rhetoric, the issue presented below and here is whether the West Virginia requirement that at least 60% of the voters must cast their ballots in favor of bonds and tax levies for school improvement is contrary to the equal protection guaranteed voters by the Fourteenth Amendment. The conclusion of the Court below was that the state grant of 50% greater voting effectiveness to every person voting in the negative in such election constituted an impermissible dilution or debasement of the vote of each person voting in the affirmative.

The Board of Education of the County of Roane, a respondent herein and defendant below, properly submitted to the voters of that County (1) the question of authorizing excess tax levies for a period of five years, a part of which additional revenue was to be used for current expenses and the remainder for capital improvements clearly needed because of marked school deficiencies, and (2) the question of incurring debt and issuing bonds in the amount of $1,830,000, the proceeds to be used for capital improvements to replace condemned structures. Of the voters participating in the election, 51.51% voted in favor of the excess tax levy and 51.55% voted in favor of the issuance of bonds. The Board of Education thereafter refused to increase the tax levy or issue bonds on the grounds that the Constitution and statutes of West Virginia required a 60% affirmative vote before the tax levy could be increased above the fixed standard and a three-fifths affirmative vote before bonded indebtedness could be incurred.[1]

The refusal of the Board of Education was upheld in the Circuit Court of Roane County but on appeal, the

[1] W. Va. Const. art. X, §§ 1, 8; W. Va. Code ch. 13, art. 1 §§ 4, 14 (Michie 1966); W. Va. Code ch. 11, art. 8 § 16 (Michie 1966).

West Virginia Supreme Court of Appeals, relying upon *Gray* v. *Sanders*, 372 U.S. 268 (1963) and its offspring, held that the 60% requirements were impermissible under the Federal Constitution.

The concept of equal protection has traditionally required uniform treatment of persons standing in the same relation to governmental action. In voting cases this concept has meant that once an electorate or constituency is properly defined, there can be no denial, debasement or dilution of votes cast from within that electorate. *Reynolds* v. *Sims*, 377 U.S. 533 (1964). The touchstone of vote debasement or dilution has been termed "one person, one vote" and is whether each person's vote is permitted to count as much, insofar as it is practicable, as any other person's vote. *Hadley* v. *Junior College District*, 38 LW 4161 (Feb. 25, 1970); *Avery* v. *Midland County*, 390 U.S. 494 (1968); *Wesberry* v. *Sanders*, 376 U.S. 1 (1964).

Under the West Virginia constitutional and statutory provisions, one person's vote does not count as much as every other person's vote. The requirement of a 60% affirmative vote means that every person's vote "against" counts 150% more than any vote "for". In practical terms this means that it requires three affirmative votes to count as much as only two negative votes; thus, one out of every three voters favoring the issuance of bonds or increased tax levy is effectively disenfranchised by the West Virginia scheme of weighting the votes. Respondents believe that the West Virginia Court properly concluded from the principle of "one person, one vote" that the 60% requirement unconstitutionally diluted or debased the votes of respondents and others of the electorate who voted in the affirmative.

It should be noted that the Supreme Court of New Mexico in *State ex rel. Witt* v. *State Canvassing Board*, 437 P. 2d 143 (N.M. 1968), reached essentially the same conclusion as the West Virginia Court from the principles contained in this Court's "one person, one vote" decisions in holding that New Mexico's constitutional requirement that constitutional amendments be ratified by two-thirds affirmative vote in each county violated the precepts of the Fourteenth Amendment.

It matters not that this election was a local, special-purpose election or that it involved issues of policy—not candidates. This Court applied the Equal Protection Clause to a local election in *Avery*, and to local, special-purpose elections in *Hadley; Cipriano* v. *City of Houma*, 395 U.S. 701 (1969); and in *Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969). The election involved in *Cipriano* was not between candidates, but had been called for the electorate's approval or disapproval of the issuance of revenue bonds by a municipal utility and this Court did not find that this fact would preclude constitutional protection. In *Hadley* this Court stated, ". . . there is no discernible, valid reason why constitutional distinctions should be drawn on the basis of the purpose of the election."

The requirement of 60% affirmative votes in an election is, in effect, but a more sophisticated and subtle approach than the crude "fencing out" of an otherwise qualified segment of the electorate in an attempt to provide another segment with special protection. The latter approach has been specifically proscribed by this Court in *Cipriano, Kramer*, and *Carrington* v. *Rash*, 380 U.S. 89 (1965).

Petitioners try to torture this case into grotesque exception to the holdings of *Gray* and its progeny, but it is inescapable that these were all voting cases and central to each was the issue of whether there had been a constitutionally forbidden debasement or dilution of votes. The instant case raises the very same issue—did the state debase or dilute the votes of those who voted in the affirmative by giving substantially less weight to them than to negative votes. It appears to respondents that the petitioners suffer from tunnel vision in narrowly viewing the "one person, one vote" holdings as requiring no more than equal access to the polls. (Petition at 10, 11). They do not see the equally important mandate that all votes cast must be counted and each person's ballot shall constitute one whole vote.

In their assumed concern for bond counsel's peace of mind, the petitioners have injected an extraneous, unsupported note into this case. If there is currently any instability in the market for West Virginia school bonds, respondents respectfully submit that the uncertainty is caused by the pendency of this petition. The law governing this issue has been clearly spelled out by this Court and accurately applied to the facts of this case by the West Virginia Court. The issue is reliably settled unless the writ sought herein is granted.

The assertion of petitioners that the decision of the Court below begs the question by assuming the validity of the majoritarian principle is a manifest confusion of the result with the pivotal issue of whether votes are debased and diluted by the 60% requirement. When any Court addresses itself to the question of unconstitutional vote debasement, the test to be applied is the Fourteenth Amendment. The Fourteenth Amendment neither com-

nciple but it does com-
pels nor forbids a majoritarian pri its electorate and to
pel a state reasonably to define orate equal treatment
accord the voters within the elect same as every other
by counting each person's vote th otection reaches the
person's. The aegis of equal p quantity. This Court,
quality of the vote as well as the d the West Virginia
we think, has clearly spoken an sponded with careful
Supreme Court of Appeals has r
discernment.

CONCLUSIO

ri to review the deci-

The petition for writ of certior eals of West Virginia
sion of the Supreme Court of App rt correctly ascertain-
should be denied because that Co equal protection con-
ed and applied the principles of nt in order to prevent
tained in the Fourteenth Amendm
debasement of respondents' votes

day of March 1970,

Respectfully submitted this 23rc

RANCIS, JR.

J. HENRY

WISE, JR.

CHARLES C.

for Respondents
Attorneys tiffs Below
and Plai

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FILED
MAY 15 1970

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1969

No. 1244-96

A. T. GORDON, et al.,
Petitioners,
vs.
GRANVILLE H. LANCE, et al.,
Respondents.

BRIEF AMICI CURIAE ON BEHALF OF CALIFORNIA TAXPAYERS' ASSOCIATION IN SUPPORT OF THE POSITION OF PETITIONERS

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1969

No. 1244

A. T. GORDON, et al., *Petitioners,*

vs.

GRANVILLE H. LANCE, et al., *Respondents.*

BRIEF AMICI CURIAE ON BEHALF OF CALIFORNIA TAXPAYERS' ASSOCIATION IN SUPPORT OF THE POSITION OF PETITIONERS

This brief is filed with the written consent of all of the parties, pursuant to Rule 42 of the Rules of the Supreme Court of the United States. It is in support of the position of petitioners upholding the validity of the provisions of the West Virginia Constitution and statutes which prohibit a political subdivision of West Virginia from issuing general obligation school or municipal bonds without the approval of more than a simple majority of the votes cast

by the qualified electors of the political subdivision voting for or against such bonds.

INTEREST OF CALIFORNIA TAXPAYERS' ASSOCIATION

California Taxpayers' Association is a nonprofit corporation organized under the laws of the State of California for the primary purpose, as stated in its Articles of Incorporation,

> "To bring about through nonpartisan and nonpolitical means, in the interest of all taxpayers in the State of California, by mutual effort, the greatest possible economies consistent with efficiency in the collection and expenditure of public monies to the end that taxes, in the State of California, and in the counties, cities, and other political subdivisions of said state, shall be reduced."

Several cases pending before the Supreme Court of the State of California present the issue of the validity, under the Equal Protection Clause of the United States Constitution, of a provision of the California Constitution (Article XI, section 18) which prohibits any California city, county or school district from issuing general obligation bonds without the approval of two thirds of the voters in the city, county or school district voting at an election held for the purpose of approving such bonds.*

---

*These cases are: *Adams v. Mihaly*, Docket No. S F 22707; *Alhambra City High School District v. Mize*, Docket No. L A 29707; *Alhambra City School District v. Mize*, Docket No. L A 29706; *Foytik v. Aronson*, Docket No. Sac 7855; *Larez v. Shannon*, Docket No. Sac 7854; *Pasadena Unified School District v. Mize*, Docket No. L A 29708; *Rosemead School District v. Mize*, Docket No. L A 29709; and *Westbrook v. Mihaly*, Docket No. S F 22706.

Amici Curiae have filed a brief in the California Supreme Court on behalf of California Taxpayers' Association supporting the validity of that provision and are filing this brief because this Court's decision in the case at bar should be dispositive of the issue before the California Court.

SUMMARY OF ARGUMENT

The principle of checks and balances is the cornerstone of American government. It is embodied in the constitutions of the states as well as the Federal Constitution. These constitutions include many checks which help to deter action in areas where restraint is needed. The subject at hand—long-term debt—is one in which reasonable caution and restraint are especially needed. Unlike most legislative action, a decision to incur long-term bonded indebtedness is irreversible. Even if the bonds subsequently turn out to have been ill-conceived, they cannot be amended or repealed (U.S. Const. Art. I, sec. 10).

The requirement that school or municipal bonds be approved by more than a simple majority of the voters does not restrict voting to certain classes of voters, nor does it present any form of "invidious discrimination" among voters. It is a reasonable regulation which serves a compelling state interest. It protects present and future taxpayers in the assumption of long-term obligations which irrevocably mortgage future taxes and affect the ability of subsequent majorities and minorities to meet what may turn out to be the more urgent requirements of the future.

Where, as here, the compelling tate interest is shown and there is no discrimination b sed on race, sex, religion, property ownership, wealt , occupation or residence, the determination of the n d for and efficacy of the particular requirement in pr ecting the compelling state interest is for the people o their legislature—not for the courts. The validity of the requirement is established by showing that it has a r tional relationship to a state's compelling interest in the continued financial integrity of its political subdivisions and the protection of the interests of future majorities nd minorities within those subdivisions.

ARGUMENT

I. THE REQUIREMENT THAT LONG- ERM BONDED INDEBTEDNESS BE APPROVED BY MOR THAN A SIMPLE MAJORITY SERVES A COMPELLING TATE INTEREST AS A REASONABLE REGULATION OF T E ASSUMPTION OF FINANCIAL BURDENS WHICH BIN ALL OF THE PEOPLE FOR LONG FUTURE PERIODS.

Most legislative action may be adopted by a simple majority. But it is also subject to rrection by repeal or modification by a simple majority Bonds are not. They bind the people, including future m jorities, to tax obligations extending over many years, nd the United States Constitution prevents their repea or amendment (U.S. Const., Art. I, sec. 10).

The issue in the case at bar is a narrow one. It has nothing to do with the representati or the qualifications of voters. It is concerned only wi the requirement of approval, by more than a simple m ority, of the issuance

of long-term general obligation bonds which irreversibly commit future taxes and finances, regardless of the will of the voters during the period of the obligation.

The mortgaging, irreversibly, of future taxes—affecting as it does the ability of the municipality or school district to preserve its credit and meet its future needs—is a matter of unusual seriousness. The taxpayers of future years have no voice in today's decision to incur long-term bond indebtedness, but they are forbidden by Article I, section 10 of the Constitution of the United States from repealing the bonds or amending the indebtedness. Requirements such as those in California and West Virginia that such bonds be approved by more than a simple majority were designed to protect those future taxpayers from what may turn out to have been the short-sighted wishes of today's majority.

Although future taxpayers cannot have a direct voice in incurring the debt, their interests are protected by imposing upon the bond proponents a burden of persuading more than a simple majority of present voters to approve the bonds and incur the long-term tax burdens. The purpose of protecting future taxpayers has been recognized by the California Supreme Court as the basis for the provision in the California Constitution requiring that municipal bonds be approved by more than a simple majority:

> "In the constitutional provision under consideration the framers had in mind the great and ever-growing evil to which the municipalities of the state were subjected by the creation of a debt in one year, which *debt was not, and was not expected to be, paid out of the revenues of that year, but was carried on*

> *into succeeding years, increasing like a rolling snowball as it went, until the burden of it became almost unbearable upon the taxpayers.* It was to prevent this abuse that the constitutional provision was enacted" (*McBean v. City of Fresno* (1896) 112 Cal. 159, 164, 44 Pac. 358, 359; emphasis added).

To similar effect, see:

Book v. Earl (1885) 87 Mo. 246, 251-252;

Shonk Land Co. v. Joachin (1924) 96 W.Va. 708, 123 S.E. 444, 446-447.

Other measures which cannot be corrected by amendment or repeal frequently require approval by vote of more than a simple majority. For example, 46 states require more than a simple majority vote to convict an impeached public official (*Index Digest of State Constitutions,* Legislative Drafting Research Fund, Columbia University (2 Ed. 1959) pp. 538-539).[1] Likewise, 43 states require a vote of more than a simple majority for a legislature to expel one of its members (*Index Digest of State Constitutions,* Legislative Drafting Research Fund, Columbia University (2 Ed. 1959) pp. 650-651).[2] In such situations a heavier vote is required because of the nature and effect of the action. Like the approval of municipal and school debt obligations, the action has a long-term effect and cannot be changed by a simple amendment or repeal.

In none of the foregoing situations, including the case at bar, is the vote of any individual debased or diluted.

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[1]These include West Virginia (W.Va.Const., Art. IV, § 9) and California (Cal.Const., Art. IV, § 18).

[2]These include West Virginia (W.Va.Const., Art. VI, § 25) and California (Cal. Const., Art. IV, § 5).

Everyone who is qualified to vote is entitled to vote but, because of the nature and effect of the action, more people are required to vote for a proposition before it can become effective.

II. A STATE HAS THE RIGHT TO REGULATE THE APPROVAL OF LONG-TERM SCHOOL AND MUNICIPAL DEBT OBLIGATIONS BY REASONABLE REGULATIONS WHICH SERVE A COMPELLING STATE INTEREST.

Where, as in the case at bar, there is no question of the qualification of the voters and the vote of every qualified voter is counted, there is no requirement in the Federal Constitution that the vote of a simple majority must prevail. Indeed, this Court has recognized that a majority vote is not sacrosanct. In *Fortson v. Morris* (1966) 385 U.S. 231, it held that a candidate for governor who had received neither a majority nor a plurality of the votes cast in the gubernatorial election could nevertheless be selected as governor without violating the equal protection clause. The Court upheld a provision of the Georgia Constitution which permitted the governor to be chosen by the legislature from the two candidates receiving the highest vote in the event no candidate received a majority at the polls.

In *Dusch v. Davis* (1967) 387 U.S. 112, the Court found no violation of the equal protection clause in the election of members of a city council who, though elected at large, were required to be residents of particular districts which were of unequal population. The residence requirement was upheld as a proper means

> "to reflect a detente between urban and rural communities that may be important in resolving the

complex problems of the modern megalopolis in relation to the city, the suburbia, and the rural countryside" (387 U.S. 117).

The court below in the case at bar placed great stress on *Kramer v. Union School District* (1969) 395 U.S. 621, and *Cipriano v. City of Houma* (1969) 395 U.S. 701[3], but neither of those cases was concerned with a requirement that bonds be approved by more than a simple majority. Moreover, in each case, the Court recognized that even exclusions from the right to vote could be supported by "a compelling state interest" (395 U.S. 627; 395 U.S. 704). In the *Kramer* case, there was no showing of a compelling state interest which would justify restricting the vote at school district elections to property taxpayers and parents in disregard of the interests of other citizens in the quality of education. In the *Cipriano* case, the Court held unconstitutional a statute which denied to a user of municipal utility services the right to vote on municipal utility bonds. There was no showing of a compelling state interest which justified limiting the vote to property owners and disregarding the concern of those who use and pay for utility services.

In determining whether there is sufficient state interest to justify the regulations involved in the case at bar, this Court need not attempt to lay down a rule which will cover all instances in which states require approval of legislative action by more than a simple majority. There may be insufficient state interest to justify such a requirement with respect to some legislative measures which

[3]See *Lance v. Board of Education of the County of Roane* (1969) ..... W.Va. ....., 170 S.E.2d 783, 789.

are subject to amendment or repeal. For example, in *Rimarcik v. Johansen* (D.Minn. February 4, 1970) ..... F.Supp. ..... [38 U.S. Law Week 2453], a three-judge district court held invalid a Minnesota requirement that an amendment to a city charter be approved by a 55 per cent majority of the voters. The adoption of a charter amendment was not irreversible; it was simply an exercise of legislative power no different from most legislation. Consequently, the court found no compelling state interest which would justify the requirement. It emphasized, however, that

> "We do not pass on the question * * * of whether under a different state constitutional or statutory scheme there may exist a compelling state interest justifying a requirement for more than a majority vote" (..... F.Supp. .....).

This Court has pointed out that in election cases, the equal protection clause "does not require that a uniform straitjacket bind citizens in devising mechanisms of local government suitable for local needs and efficient in solving local problems" (*Avery v. Midland County* (1968) 390 U.S. 474, 485). Yet this Court is now asked to hold that the equal protection clause—which itself had as a basic purpose the protection of the rights of minorities (*Yick Wo v. Hopkins* (1886) 118 U.S. 356, 369-370)—gives to a simple majority of the voters the absolute constitutional right to bind the rest (and even the majorities in succeeding years) for long future periods.

III. THE REQUIREMENT THAT SCHOOL AND MUNICIPAL BONDS BE APPROVED BY MORE THAN A SIMPLE MAJORITY DISENFRANCHISES NO ONE, INVOLVES NO DISCRIMINATION ON ACCOUNT OF RACE, SEX, RELIGION, PROPERTY OWNERSHIP, WEALTH, OCCUPATION OR RESIDENCE, AND CONSTITUTES A REASONABLE MEANS OF PROTECTING PRESENT AND FUTURE CITIZENS IN THE ASSUMPTION OF LONG-TERM OBLIGATIONS. THE BURDEN OF ESTABLISHING THE INVALIDITY OF THAT REQUIREMENT IS ON THOSE WHO ATTACK IT. IN ANY EVENT, THE REQUIREMENT MEETS THE EXACTING STANDARD OF SERVING A COMPELLING STATE INTEREST.

The requirement that bonds be approved by more than a simple majority of the voters does not discriminate among voters because of race, sex, religion, property ownership, wealth, occupation or residence. Unlike the laws involved in *Kramer v. Union School District* (1969) 395 U.S. 621, and *Cipriano v. City of Houma* (1969) 395 U.S. 701, it does not restrict voting on bond issues to certain classes of voters. Where, as here, there is no exclusion from voting, or invidious discrimination among voters, the burden is upon those who attack the validity of the provision in question (*McDonald v. Board of Election* (1969) 394 U.S. 802, 807-809; *Kramer v. Union School District* (1969) 395 U.S. 621, 626-627, footnote 6).

McDonald v. Board of Election (1969) 394 U.S. 802, upheld a voting statute under which absentee ballots were available to certain voters but not to persons who were unable to vote at their polling places because they were in jail awaiting trial and lacked sufficient funds to post bail. This Court applied the traditional standard of determining validity—whether the statute bore a rational relationship to a legitimate state end (394 U.S. 809)—

because the statute did not discriminate on the basis of wealth or race and did not deny anyone the right to vote (394 U.S. 807-808).

Regardless, however, of which basic standard is applicable in the case at bar, a state has a compelling interest in protecting its present and future citizens in assuming long-term obligations and has a right to adopt reasonable regulations to protect that interest.

Once the question of whether a regulation serves a compelling state interest has been determined, the courts are ill-equipped to decide whether the particular regulation is the most appropriate method of serving that interest. It is sufficient that there is a rational basis for the decision of the people in such states as West Virginia and California that the compelling state interest is best served by requiring the vote of more than a simple majority before a political subdivision may irreversibly mortgage future finances and bind future taxpayers.

In this regard, it is not for the courts to set aside a particular statute merely because that statute may not solve all of the problems which might have been solved by different provisions. A state

> "need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked" (*McDonald v. Board of Election* (1969) 394 U.S. 802, 809).[4]

The requirement of approval of general-obligation bonds by more than a simple majority is much less restrictive of

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[4]Other cases to the same effect include *Roschen v. Ward* (1929) 279 U.S. 337, 339; *Williamson v. Lee Optical Co.* (1955) 348 U.S. 483, 489; *Seagram & Sons v. Hostetter* (1966) 384 U.S. 35, 50-51.

the ability of local government to raise money for public purposes than other measures—unquestionably constitutional—which might be devised to protect a state's compelling interest. For example, a state could establish a limitation, expressed in either dollars or percentage of assessed valuation, on the maximum indebtedness permitted to be incurred by a municipality—a measure which would leave local governments with far less flexibility than the requirement that bonds be approved by greater than a simple majority.[5] Similarly, a state could require that bonds be approved by a simple majority of all the registered voters in the district (see *Clay v. Thornton* (1969) ..... S.C. ....., 169 S.E.2d 617, appeal dismissed for want of a substantial Federal question sub nom. *Turner v. Clay* (1970) ..... U.S. ..... [25 L.Ed.2d 40]). Such a requirement would make bond approvals more difficult than the provisions involved in the case at bar. Indeed, the Federal Constitution would not prevent a state from flatly forbidding municipalities or school districts from issuing general obligation bonds.

Once the issue is brought down to a determination of the efficacy of a particular regulation, that issue is primarily for the people or their legislature. It is not for the courts to override the decision of the people where (a) there is no discrimination based on race, religion, sex, residence, wealth, occupation or property ownership, and

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[5]Such a limitation was considered by the framers of the California constitutional requirement of approval by more than a simple majority. It was rejected because of its inflexibility; such a limitation would prevent a municipality or school district from incurring necessary indebtedness in the event of a flood or other emergency (*Debates & Proceedings of the Constitutional Convention of the State of California of 1878-1879*, pp. 178, 625, 1068-1069, 1382-1385).

(b) the regulation has a rational relationship to the compelling state interest to be promoted and preserved. Here, there is no invidious discrimination. The requirement of more than a simple majority has a rational relationship to the continued financial integrity of a state's political subdivisions and the protection of future majorities and minorities within those subdivisions.

IV. THE DECISION OF THE COURT BELOW FINDS NO SUPPORT IN ANY OF THE DECISIONS OF THIS COURT.

The irreversible long-term effect of municipal and school bonds distinguishes the case at bar from all cases in which this Court has considered the equal protection clause in the context of voting.

The case at bar does not present any problem of equal representation in the legislature. Voting on bond issues is not restricted to certain classes of voters. Every qualified voter is entitled to vote on a bond issue. He has the same freedom of choice as every other voter.

In *Baker v. Carr* (1962) 369 U.S. 186, the Court held that the question of whether a state legislature is properly apportioned raises justiciable constitutional issues. The decisions in *Reynolds v. Sims* (1964) 377 U.S. 533; *WMCA, Inc. v. Lomenzo* (1964) 377 U.S. 633; *Maryland Committee v. Tawes* (1964) 377 U.S. 656; *Davis v. Mann* (1964) 377 U.S. 678; *Roman v. Sincock* (1964) 377 U.S. 695; and *Lucas v. Colorado Gen. Assembly* (1964) 377 U.S. 713, held that seats in both houses of bicameral state legislatures must be apportioned according to population. *Wesberry v. Sanders* (1964) 376 U.S. 1, and *Kirkpatrick*

v. Preisler (1969) 394 U.S. 526, applied this apportionment rule to Congressional districts, *Avery v. Midland County* (1968) 390 U.S. 474 applied it to units of local government, and *Hadley v. Junior College District of Metropolitan Kansas City* (1970) .....U.S. ..... [40 L.Ed.2d 45] applied it to single-purpose entities of local government. Legislative apportionment is not at issue in the case at bar.

In *Gray v. Sanders* (1963) 372 U.S. 368, the Court held unconstitutional the "county-unit" voting system of Georgia, in which candidates for state and federal elective offices were chosen by an electoral system in which each county had the same number of votes, regardless of population. No such voting system is at issue in the case at bar; bond propositions are subject to direct voting by the electorate, and an individual's vote is not constricted or amplified by reason of his place of residence.

The rule of *Gray v. Sanders* was applied by the New Mexico Supreme Court in *State ex rel. Witt v. State Canvassing Board* (1968) 78 N.M. 682, 437 P.2d 143. The New Mexico court struck down as unconstitutional a state requirement that proposed constitutional amendments be approved by two thirds of the voters in every county. This decision rested not on any alleged unconstitutionality of requirement of more than a simple majority vote, but on the ground that voters in less populous counties were given greater voting power than voters in more heavily populated counties, in violation of the rule of *Gray v. Sanders*. The New Mexico constitutional amendment procedures would have been declared unconstitutional even if only a simple majority was required in every county.

Harper v. Virginia Bd. of Elections (1966) 383 U.S. 663, held that Virginia's poll tax requirement violated the equal protection clause by discriminating among voters on the basis of economic status. No such economic discrimination is involved in the case at bar.

In *Kramer v. Union School District* (1969) 395 U.S. 621 (discussed supra, pp. 8, 10), voting at school district meetings had been restricted to property taxpayers or parents of school children in disregard of the interests of other citizens in the quality of education. In *Cipriano v. City of Houma* (1969) 395 U.S. 701 (discussed supra, pp. 8, 10), voting on municipal utility bond issues had been restricted to property taxpayers in disregard of the interests of those who used and paid for utility service. In *Carrington v. Rash* (1965) 380 U.S. 89, the State of Texas had denied the franchise to military personnel stationed in the State. All three cases held the denial of the franchise unconstitutional. These decisions do not apply to the case at bar; here no segment of the population has been unconstitutionally denied the franchise, and all qualified voters were permitted to vote on the bond issues.

These decisions have no bearing on the question of whether a state may require approval of municipal and school bonds by more than a simple majority when those bonds will bind all of the people for long future periods. To ignore West Virginia's compelling state interest in protecting present and future citizens in the assumption of long-term obligations would indeed "require that a uniform straitjacket bind citizens in devising mechanisms of local government" (*Avery v. Midland County* (1968) 390 U.S. 474, 485).

CONCLUSION

Most action can be approved by a simple majority. It can also be amended or repealed by a majority if the action turns out to be unwise or its burdens too great. This is not true of bonds. When they are approved by the voters, they do not merely bind the people for the day or the year—they impose a burden on the people for 10, 15 or 20 years which no future majority—of even 100 per cent—can change. The requirement that bonds be approved by more than a simple majority serves the purpose of protecting future majorities over long periods of time. The requirement serves a compelling state interest. It denies no one the right to vote and to have his vote counted equally with all others. It denies no one the equal protection of the laws.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1969

No. 1244 96

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A. T. GORDON, et al.,
Petitioners,

vs.

GRANVILLE H. LANCE, et al.,
Respondents.

On Writ of Certiorari to the Supreme Court of Appeals of West Virginia

BRIEF OF THE CITY AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA, AMICUS CURIAE IN SUPPORT OF PETITIONERS

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BRIEF OF THE CITY AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA, AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE CITY AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA

At the present time there are seven original proceedings and one appellate proceeding pending in the Supreme Court of the State of California each involving a petition for a writ of mandate seeking to

have declared invalid as being violative of the Equal Protection Clause of the 14th Amendment to the Constitution of the United States the provisions of Section 18 of Article XI of the Constitution of the State of California, which requires a two-thirds affirmative vote of those voting on a proposition to authorize the incurrence of a bonded indebtedness by local subdivisions of the state.[1] Section 18 of Article XI reads as follows:

> "Sec. 18. No county, city, town, township, board of education, or school district, shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose, nor unless before or at the time of incurring such indebtedness provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also provision to constitute a sinking fund for the payment of the principal thereof, on or before maturity, which shall not exceed forty years from the time of contracting the same; provided, however, anything to the contrary notwithstanding, when two or more propositions for incurring any indebtedness of liability are submitted at the same election, the votes cast for and against each proposition shall be counted separately, and when two-thirds of the qualified

[1]The two-thirds vote requirement of Section 18 of Article XI and the three-fifths and 60 percent vote requirements of the Constitution and statutes of the State of West Virginia and all requirements for more than a simple majority vote are herein referred to as the extra-majority voting requirement.

electors, voting on any one of such propositions, vote in favor thereof, such proposition shall be deemed adopted."

The eight proceedings are calendared for hearing before the Supreme Court of the State of California on May 15, 1970.

The City and County of San Francisco is involved in two of the proceedings, S.F. 22706, Westbrook, et al. v. Mihaly, et al., and S.F. 22707, Adams v. Mihaly, et al., by reason of the failure of two bond proposals, one for school purposes and one for recreation purposes, to receive the two-thirds vote required by Section 18 of Article XI at an election held in the City and County on November 4, 1969. Each proposal received a majority vote. The petitioners in S.F. 22706 are parents of children who it is alleged would have benefited by the passage of the bond proposals, and the petitioner in S.F. 22707 is a registered voter who filed a petition on behalf of himself and all other registered voters who voted affirmatively on the bond proposals. The respondents in each proceeding are Emmery Mihaly, Registrar of Voters of the City and County, Robert J. Dolan, Clerk of the Board of Supervisors of the City and County, and Nathan B. Cooper, Controller of the City and County.

The petitioners in each proceeding allege that the two-thirds vote requirement of Section 18 of Article XI violates the Equal Protection Clause of the 14th Amendment of the United States Constitution and pray that the Supreme Court of the State of California declare that this voting requirement be held

invalid and unconstitutional and that a writ of mandate issue commanding the respondent officials of the City and County to take official actions leading to the issuance and sale of the bonds on the basis that they were authorized by the electorate by a majority vote.

The Constitution and statutes of the State of West Virginia provide for a three-fifths vote requirement for the incurrence of bonded indebtedness and a separate 60 percent vote requirement to make an additional tax levy to retire the bonds. The one election held under the provisions of Section 18 of Article XI of the California Constitution both authorizes the incurrence of the bonded indebtedness and provides for the levy of a tax to retire the bonds. However, the basic issue involved in the proceedings now pending in the Supreme Court of the State of California is identical to the basic issue involved in the proceeding before this Court, namely, the constitutionality of an extra-majority voting requirement to authorize the incurrence of bonded indebtedness by political subdivisions of the state under the Equal Protection Clause of the 14th Amendment of the Constitution of the United States, and this brief is directed to this issue.

The provisions of Section 18 of Article XI requiring a two-thirds vote to authorize the incurrence of bonded indebtedness by local subdivisions of the state was part of the Constitution of the state as adopted in 1879. On the ballot at the general statewide election held in California on November 8, 1966, there appeared Proposition 4, a proposition to amend Section 18 of Article XI to provide that instead of a two-

thirds vote to incur an indebtedness, any local general obligation bonds for library purposes or public school purposes could be approved by 60 percent of the qualified voters voting on such proposition. This liberalization proposition was defeated by a majority vote of the electorate of the state and also by a majority vote of the electorate of the City and County of San Francisco. (See page 28, "California Statement of Vote and Supplement, November 8, 1966 General Election," published by Frank M. Jordan, Secretary of State, Appendix A.)

The interest of the City and County of San Francisco is in the preservation of the inherent and sovereign right of the people of the State of California, including the people of the City and County of San Francisco, to thus control the public indebtedness of the local subdivisions of the state in their fundamental law, in the preservation of the fiscal integrity of the state and its local subdivisions, and also in the consequences that the decision of this Court in the proceeding before it could have on approximately 300 other provisions contained in the Constitution and statutes of the State of California and the Charter of the City and County of San Francisco requiring more than a majority vote by the electorate or legislators to effectuate particular legislative or governmental actions.

The City Attorney of the City and County of San Francisco is authorized to file this brief on behalf of the City and County under the following provision of Section 26 of the Charter of the City and County (Appendix B):

"The city attorney must represent the city and county in all actions and proceedings in which it may be legally interested, . . ."

SUMMARY OF ARGUMENT

The one man, one vote concept has no application in this case. The Court below erroneously concluded that the concept was a principle of law to be applied in voting cases without qualification or exception and basically decided the case on this premise contrary to this Court's careful and discriminating utilization of the concept and its admonitions as to particular applications of its general pronouncements.

The cases wherein this Court applied the concept or has otherwise invalidated voting laws on equal protection grounds are completely distinguishable factually, politically and inherently. The extra-majority voting requirement is the most sanctioned and widely-used mechanism of government in use in the United States to guard against impulsive, precipitate or improvident governmental administrative or legislative action. It has never, except in the decision of the Court below, been either politically or judicially considered to constitute invidious discrimination violative of the Equal Protection Clause nor does it in fact invidiously discriminate against persons in violation of that Clause. It is a rational and wise method of governmental control by the people of the state within their sovereign powers of a governmental matter that vitally affects the fiscal and economic interests and

welfare of the state and it would satisfy a compelling state interest test if this were a case where such justification would be necessary. However, this is not such a case but rather, one where the presumption principle of itself is sufficient to sustain the constitutionality of the subject constitutional and statutory provisions.

ARGUMENT

I

THE EXTRA-MAJORITY VOTE REQUIREMENT IS ENGRAINED IN THE GOVERNMENTAL STRUCTURE OF THE UNITED STATES. IT HAS BEEN UNIVERSALLY SANCTIONED AND ENFORCED BY THE COURTS THROUGHOUT THE UNITED STATES.

The extra-majority vote requirement is the most politically and judicially sanctioned and widely used mechanism of government in use in the United States to check precipitate or improvident governmental action. As well stated by the Supreme Court of the State of Idaho in the recently decided case of *Bogert v. Kinzer* (Feb. 17, 1970), 465 P 2d 639, which sustained the constitutionality of the provisions of the Constitution and statutes of the state which authorized the issuance of general obligation bonds by subdivisions of government only upon the assent of two-thirds of the qualified electors voting at an election held for that purpose:

> "We do not believe that the theory of 'one man, one vote,' as discovered in the Equal Protection Clause, militates against and prohibits the continuation of a political theory which lies at the

> foundation of our government, which, simply stated, is, a consensus amounting to more than a simple majority is not only desirable but necessary at certain times and in certain circumstances.";

and in *Duncan v McCall,* 139 US 449, 461 (1891):

> "By the Constitution, a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves; but while the people are thus the source of political power, their governments, national and state, have been limited by written Constitutions, and they have themselves thereby set bounds to their own power, as against the sudden impulses of mere majorities."

The extent of the permeation and engrainment in our governmental structure of the minority right to defeat governmental action or legislation may be in part demonstrated by the rights so provided in six provisions of our United States Constitution illustrated by the two-thirds vote requirement of Section 2(2) of Article II for the ratification of treaties by the Senate, 20 provisions of the Constitution of the State of California illustrated by Section 8 of Article IV requiring a two-thirds vote by the Legislature for the passage of emergency measures, Section 7½ (6) of Article XI requiring a two-thirds vote of the

electorate to surrender and annul a county charter, and Section 2 of Article XI requiring a two-thirds vote of the electorate to remove a county seat, 20 provisions of the Charter of the City and County of San Francisco illustrated by Section 16 requiring a three-fourths vote to adopt an emergency measure, and more than 200 state statutory provisions illustrated by Section 32243 of the Health and Safety Code requiring a two-thirds vote of the electorate to approve a special assessment in a hospital district and Section 33366 requiring a two-thirds vote of a board of supervisors to adopt a redevelopment plan when there has been an unfavorable recommendation by a planning commission.

A minority vote provision which lies at the very heart of our governmental system and the separation of powers it envisages which is common to the government of the United States, the State of California, the City and County of San Francisco and to governments throughout the United States, is the minority right to defeat passage of legislation over an executive veto found in the two-thirds vote requirement to override contained in Section 7 of Article I of the United States Constitution, Section 10 of Article IV of the Constitution of the State of California, and Section 14 of the Charter of the City and County of San Francisco. To blindly extend the one man, one vote concept to votes, per se, as was done in the Court below, would be completely destructive of this generally prevailing governmental system as if only a majority vote could be required, the chief executives' participa-

tion in the law-making process would be completely nullified.

The political acceptability of the extra-majority requirement had been universally sanctioned and judicially enforced by the Courts of this country prior to the decision in the Court below, and since that decision in the case of *Bogert v. Kinzer, supra.* The following is only a partial list of such decisions: *Jarrolt v. City of Moberly,* 103 US 580 (1881); *San Francisco Gas Co. v. Brickwedel,* 62 Cal. 641 (1882); *Carroll County v. Smith,* 111 US 556 (1884); *Hill v. City of Memphis,* 134 US 198 (1890); *Bradford v. City and County,* 112 Cal 537, 41 P 912 (1896); *Montgomery County Fiscal Court v. Trumble,* 47 SW 773 (1898); *Law v. San Francisco,* 144 Cal 384, 77 P 1014 (1904); *In re Pfahler,* 150 Cal 71, 88 P 270 (1906); *Bauch v. City of Cabool,* 148 SW 1003 (1912); *City of Santa Cruz v. Wykes,* 202 F 357 (9 Cir 1913); *Waugh v. Shirer, et al.,* 249 NW 246 (1933); *Robb v. City of Tacoma,* 28 P 2d 327 (1933); *Whiting Co. v. City of Burlington,* 175 A 35 (1934); *Varney v. City of Albuquerque,* 55 P 2d 40 (1936); *Robinson v. Payne,* 20 Cal App 2d 103, 66 P 2d 710 (1937); *Opinion to the Governor,* 58 A 2d 559 (1948); *City of Palm Springs v. Ringwald,* 52 Cal 2d 620, 342 P 2d 898 (1959); *State ex rel Witt v. State Canvassing Board,* 437 P 2d 143 (1968).

Especially note:

29 CJS, p. 33:

> "In all periods and in all countries it may be safely assumed that no privilege has been held to

be more exclusively within the control of governmental power than the privilege of voting, each state in turn regulating the subject by sovereign political will."

Whiting Co. v. City of Burlington, supra, p. 43:

"The rule of two-thirds vote, or of unanimous vote, can as reasonably be implied as that af majority vote."

Waugh v. Shirer, supra, pp. 247, 248, 249:

". . . section 1171-d4 . . . demands that it shall be carried . . . by at least 60 per cent of the total votes cast for and against the proposition."

* * * * *

"Nowhere in section 1171-d4, as argued by the appellant, is there granted privileges contrary to section 30, article 3, of the Constitution, to certain citizens, or classes of citizens, not offered upon the same terms to the appellant. The law applies uniformly and generally, not only to the citizens of Butler County, but to each county and the citizens thereof in the state of Iowa."

* * * * *

"There is nothing in the Constitution providing that a bond issue of the kind in question may be carried by a majority vote, as distinguished from the vote required in section 1171-d4."

Opinion to the Governor, supra, p. 559:

"In other words, in the absence of any constitutional provision to the contrary, the general assembly may provide in such act or resolution that approval of the question shall require the affirmative votes of a majority of all the quali-

fied electors voting in an election as distinguished from those voting only on the proposition itself; or it may provide that the affirmative votes of a majority of those electors actually voting on the particular proposition shall be sufficient to constitute an approval of the question. Of course in either of the above-mentioned provisions the general assembly may require more than a mere majority by providing, for example, that two-thirds or three-fifths or other major fraction of all the votes cast on the particular proposition shall be necessary to constitute such an approval."

State ex rel. Witt v. State Canvassing Board, supra, pp. 151, 155:

"Having disposed of the problem of the requirement of a two-thirds vote in every county we next note the question of whether there was compliance with the requirement of ratification by at least 'three-fourths of the electors voting in the whole state.' No serious attack is made on the constitutionality of this provision."

* * * * *

"The requirement of a two-thirds vote in each county being unconstitutional, and the demand of ratification by 'at least three-fourths of the electors voting in the whole state' having been met, the adoption of constitutional amendment submitted as Amendment No. 7 at the election held November 7, 1967 was accomplished."

Robinson v. Payne, supra, pp. 105, 107:

"A comparison of the statute with the Constitution reveals that the statute [Chapter 356, Statutes of 1935] allows an increase over the 5 per

cent limitation if a majority of the electors of the political subdivision involved authorize an increase, whereas article XI, section 20, of the Constitution requires a two-thirds vote."

* * * * *

"We are of the opinion, therefore, that chapter 356, Statutes of 1935, violates article XI, section 20, and is invalid, . . ."

City of Santa Cruz v. Wykes, supra, p. 364:

"By the Constitution of the State of California (section 18, article 11) it is provided:

* * * * *

"This is an inhibition against which a municipality cannot incur any indebtedness exceeding in any year the income and revenue provided for it for such year except in a certain mode or manner prescribed. The mode, therefore, becomes the measure of the power of the municipality to incur an indebtedness beyond the measure fixed by the fundamental law. That is to say, before the city can incumber itself with such excess indebtedness, it must have the consent of two-thirds of its qualified electors to that purpose, . . ."

Jarrolt v. City of Moberly, supra, p. 586:

"Considering the provision in this spirit, and looking at the evil to be prevented, we are of opinion that the issue by the defendant, of its bonds to purchase lands to be donated to the railway here, was a loan of its credit which could not be made without the assent of two thirds of the qualified voters of the city . . . The Act of March 18, 1870, must, therefore, be held to be in conflict with the Constitution of the State. It

authorizes a majority of the voters of a municipality to do that which the Constitution declares the Legislature shall not authorize to be done, except by the assent of two thirds of its voters."

II

THERE IS NO FEDERAL CONSTITUTIONAL RIGHT IN THE CITIZENS OF A POLITICAL SUBDIVISION OF THE STATE TO INCUR A BOND INDEBTEDNESS OR TO HAVE SUCH AN INDEBTEDNESS INCURRED BY A MAJORITY VOTE OR IN ANY PARTICULAR WAY.

The local government and its constituent electorate have only limited powers derived from the people of the state through their constitution and subject to their sovereign control under that fundamental law.

United States Constitution Amendment 10:

> "The powers not delegated to the United States by the Constitution nor prohibited by it to the states are reserved to the states respectively or to the people."

California Constitution Article I, Section 2:

> "All political power is inherent in the people. Government is instituted for the protection, security and benefit of the people, and they have the right to alter or reform the same whenever the public good may require it."

In the case of *In re Pfahler, supra,* the Supreme Court of the State of California pointed out as follows, 88 P at p. 274:

> "It is clearly a question of local policy with each state what shall be its various political subdi-

visions for purposes of internal government, and what shall be the extent and character of the powers of those subdivisions and the manner of their exercise. The power of a state in such matters is absolute. (See *Claiborne v. Brooks,* 111 U.S. 400 [4 Sup. Ct. 489]; *Forsyth v. Hammond,* 166 U.S. 506 [17 Sup. Ct. 665].) Where the authority of the electors of a municipality or other subdivision of a state to directly legislate in a matter of purely local concern is denied by a state court, it is denied solely upon the ground that the state constitution or statutes forbid the exercise of such power, as in *Elliott v. Detroit,* 121 Mich. 611 [84 N.W. 820], and many cases cited by petitioner. (See Cooley on Constitutional Limitations, 7th ed. pp. 165, 166; Dillon on Municipal Corporations, sec. 44 and note.) The extent to which the people of a municipality shall be allowed to directly participate in the governmental function of legislating therefor in local or municipal affairs is therefore purely a question of state policy, in the determination of which the state is not restricted by any provision of the federal constitution. In thus speaking of the state, we mean not the legislature of the state, or the executive, or the judiciary, but the entire body of the people, who together form the body politic, known as the 'state.' (*Panhallow v. Doane's Admr.,* 3 Dall. 93 [Fed. Cas. No. 10,925]; *Brown v. State,* 5 Colo. 499.)"

In the case of *Whiting County v. City of Burlington, supra,* the Court noted that the city did not have an implied charter right to a majority vote as a municipal corporation in Vermont was a creature of the legislature possessing only such powers or rights as

were expressly granted to it by the legislature or as clearly implied in, or incident to, those expressly granted.

This limited nature of the power in the citizens of a political subdivision of the state with reference to their local government also found expression in the apportionment case of *Reynolds v. Sims,* 377 US 533 (1964), wherein the Court states as follows (p. 575):

> "Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate government instrumentalities created by the State to assist in the carrying out of state governmental functions. As stated by the Court in Hunter v. City of Pittsburgh, 207 US 161, 178, 52 L ed 151, 159, 28 S Ct 40, these governmental units are 'created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them,' and the 'number, nature and duration of the powers conferred upon [them] . . . and the territory over which they shall be exercised rests in the absolute discretion of the State.'"

Also see the case of *Detroit Edison Co. v. Township School Dist.,* 378 F 2d 225 (1967) (Cert. Den. 389 US 932), wherein it was alleged, inter alia, that a statute which permitted annexation and debt assumption proceedings was violative of due process and equal protection clauses of the 14th Amendment because the individual plaintiffs were denied the right to vote in an annexation proposal and their voting power was debased and diluted because they were compelled to

vote in common with other adversely interested electors on a debt assumption issue. The Court, after noting the power of governmental control of the state over its political subdivisions, stated (p. 229):

> "With respect to the annexation issue, plaintiffs' reliance on the relatively recent apportionment cases is misplaced. The Court in Reynolds v. Sims, 377 U.S. 533, 554, 84 S.Ct. 1362, 1378, 12 L.Ed.2d 506 (1954), for example, recognized that 'all qualified voters have a constitutionally protected right to vote' (referring of course to the right to vote for a 'candidate of one's choice' in a 'representative government' system), and thus, the Court, relying on the equal protection concept, limited the states' power to disregard population in defining political boundaries for election purposes. However, as the District Court noted, the reapportionment cases 'create no constitutional rights in affected citizens concerning the *procedure* for creating or altering' any type of state district. The judgment of the District Court with respect to the annexation issue will hereinafter be affirmed; . . ." (Emphasis by the Court.)

III

THE PRESUMPTION OF CONSTITUTIONALITY IS SUFFICIENT OF ITSELF TO SUPPORT THE CONSTITUTIONALITY OF THE SUBJECT EXTRA-MAJORITY VOTE REQUIREMENTS.

In 16 CJS page 443, the presumption principle is stated as follows:

> "In order to justify a court in pronouncing a provision of the State Constitution to be in contravention of the Constitution of the United

> States the case must be so clear as to be free from all doubt; and an amendment of a State Constitution must be presumed not to be in conflict with the organic law unless the contrary is made to appear, every presumption of law and fact being indulged in favor of the legality of such amendment, unless the contrary is made clearly manifest. The onus is on one who contests a provision or the organic law of a state to prove the nullity thereof to the exclusion of every reasonable hypotheses."

The application of this principle is especially compelling here in view of the political and judicial sanction universally accorded the extra-majority requirement in the nation's history and the extensive and vital role it occupies and has occupied in the conduct of this nation's governmental institutions.

The rationality of the requirement in connection with the incurrence of long range governmental indebtedness is manifest from the nature of the requirement itself and the judgment of the sovereign people of the state as to its necessity in such connection should be deemed conclusive. This is an economic and fiscal concern of the state and as this Court has heretofore observed "Certainly this court will not interpose its own economic views or guesses when the state has made its choice." (*Safeway Stores v. Oklahoma Retail Grocers Assn.*, 360 US 334, 341 (1959).

The rationality and necessity of such a restriction in the promotion of the fiscal and economic interests of the state can of course be demonstrated and in Cali-

fornia the state interest has been recognized and received judicial expression by the Courts, as follows:

San Francisco Gas Co. v. Brickwedel (1882), 62 Cal. 641, 642:

> "The system previously prevailing in some of the municipalities of the State by which liabilities and indebtedness were incurred by them far in excess of their income and revenue for the year in which the same were contracted, thus creating a floating indebtedness which had to be paid out of the income and revenue of future years, and which, in turn, necessitated the carrying forward of other indebtedness, was a fruitful source of municipal extravagance. The evil consequences of that system had been felt by the people at home and witnessed elsewhere. It was to put a stop to all of that, that the constitutional provision in question was adopted. The change was eminently wise. A somewhat similar provision in the old Constitution with respect to State indebtedness saved the people of the State a vast amount of money. (*People v. Johnson,* 6 Cal 503; *Nougues v. Douglass,* 7 id. 65.)"

McBean v. City of Fresno (1896), 112 Cal 159, 164, 44 P 358, 359:

> "In the constitutional provision under consideration the framers had in mind the great and ever growing evil to which the municipalities of the state were subjected by the creation of a debt in one year, which debt was not, and was not expected to be, paid out of the revenues of that year, but was carried on into succeeding years, increasing like a rolling snowball as it went, until the burden of it became almost unbearable upon the taxpayers."

Garrett v. Swanton (1932), 216 Cal 220, 235, 13 P 2d 725, 731:

> "The constitutional provision involved is based on sound public policy. Arguments of convenience, of policy, or of present necessity, should not be allowed by loose construction to weaken the force or limit the extent of debt limit provisions."

City of Redondo Beach v. Taxpayers, etc. (1960), 54 Cal 2d 126, 131, 352 P 2d 170, 173:

> "The purpose of the constitutional protection of article XI, section 18, is to safeguard the general funds and property of a municipality from a situation whereby the holders of an issue of bonds could, at some time after the issuance thereof, force an unconsented-to increase in the taxes of, or foreclose on the general assets and property of the issuing public corporation to obtain payment of the principal or interest thereon."

Lagiss v. County of Contra Costa (1963), 223 Cal App 2d 77, 85, 35 Cal Rptr 450, 454:

> "This constitutional provision was enacted to prevent the improvident creation of inordinate debts which might be charged against taxpayers in ever increasing volume from year to year."

Thus, the interest of the state in the two-thirds rule basically lies in the especial effect of the bonded indebtedness in question and its long term and irrevocable restrictions on the will of the people, including future majorities and minorities who may oppose the indebtedness and its purpose and yet be bound by it, and also in its effect on the financial resources and solvency of the community and its ability to satisfy

future needs because of the cumulative strain imposed on the community's finances by such indebtedness.

The extra-majority vote requirement acts as a brake on the financing of public improvements by the bonding method of incurring long range indebtedness with its attendant, and, at the present time, astronomical interest requirements which benefit the investor and not the improvement. By the requirement the state seeks to insure that a representative public sentiment be satisfied as to the necessity for the improvement, its priority over other needed public improvements, that its effect on existing and future tax rates does not impair the solvency of the community and that the taxable property of the community can absorb its cost considering the total amount of public indebtedness then outstanding and the projections for future needs.

In an analysis of municipal indebtedness contained in an article in Volume 30, *Michigan Law Review* 833 (1932), the author, in noting the failure to control the evils attendant to long range indebtedness solely by the device of maximum limitations based on the assessed value of property in the jurisdiction, observed as follows (pages 837-838):

> "Then the financial crisis and economic depression of 1873 and 1874 brought out the fact that municipal borrowing had advanced beyond sane limits.
>
> "The reaction which followed resulted in most states in the creation of upper limits upon the borrowing power. Local government borrowings were limited to fixed percentages of assessed val-

uations. Sometimes such limitations were incorporated in constitutions, sometimes in statutes.

"It might seem that these limitations would suffice to guard against local extravagance and against the creation of unduly burdensome obligations. However, this has been far from the case. They have almost completely failed of accomplishing any good end.

"In the first place, limits upon total indebtedness are no guarantee whatsoever of the character of the expenditure within the proscribed limits. Municipal officials may borrow and spend as recklessly as the unconcerned electorate will permit up to the constitutional or statutory barrier. Limitations upon *quantity* of indebtedness have proved no safeguard of *quality* of municipal expenditures." (Emphasis by the author of the article.)

The extra-majority vote requirement serves to insure to the extent that it is possible to do so, the quality of the expenditure by requiring that a representative element of othe qualified electors of the community be convinced of its necessity, its wisdom, its financial feasibility and the financial ability of the community to bear the cost of the expenditure.

The majority vote would not achieve the fiscal and economic objectives of the state in controlling the bonded indebtedness of its political subdivisions. A majority vote on a bond proposition rarely represents the majority will of the qualified electors of the community. In the ten year period 1959-1969, the official records of the City and County of San Francisco show

that out of 27 bond proposals that received a majority vote on the proposal, only 4 represented a majority of the registered electors of the City and County and in some cases the majority vote represented less than 30 percent of the registered electors. The futility of such a vote is further demonstrated by studies that show that practically all bond proposals submitted would be affirmed by such a vote. Thus, a survey of bond elections conducted in the Cities of Los Angeles and San Francisco in the years 1950 to 1960 showed that 95 percent of all proposals received favorable majority votes although less than 50 percent were passed by the required two-thirds margin. (Starner, *General Obligation Bond Financing by Local Governments,* pp. 76-80 (University of California, Bureau of Public Administration, 1961).)

In California, as in other states, the property of the same taxpayer has a liability for city bonds, for county bonds, for special district bonds and it has a contingent liability for the bonds of the state. The ease with which bond proposals would pass under a majority vote would inevitably impose a cumulative burden on his taxable property that the taxpayer would be unable to absorb and would result in every evil sought to be precluded by the extra-majority vote requirement and in additional modern day evils not envisioned by the constitutional framers. The population of California increased from 850,000 in 1879 to a present population of approximately 19,600.000. There has been a corresponding tremendous increase in local political subdivisions of the state and other special

service governmental entities, all possessing power to encumber the taxable property of the state by the incurrence of long range bonded indebtedness and a proliferation of bond proposals from these multiple public entities would flood the bond market thus creating a highly competitive market with consequent sharp rises in interest requirements and the inability of some entities to market bonds. The result is a halt in public improvements under construction, a rise in unemployment and a generally adverse effect on the state's economy. The extra-majority vote requirement tends to deter these disastrous consequences, whereas the majority vote requirement would invite them.

The foregoing basic exposition is addressed to the rationality, wisdom and necessity for the control by the state of the bonded indebtedness of its local political subdivisions. The reasons for such controls would amply satisfy a compelling state interest test if this were a case where such a justification were required. However, it is respectfully submitted for the reasons hereinafter discussed, that this is not such a case and that the compelling state interest justification is inapplicable.

IV

THE EXTRA-MAJORITY VOTE REQUIREMENT FOR THE INCURRENCE OF BONDED INDEBTEDNESS BY POLITICAL SUBDIVISIONS OF A STATE DOES NOT CONSTITUTE INVIDIOUS DISCRIMINATION. THE ONE MAN, ONE VOTE CONCEPT IS NOT APPLICABLE IN SUCH CASES.

In a series of decisions including the reapportionment decisions, this Court has held that under the circumstances of the particular cases considered, dilu-

tion or denial of voting rights by reasons of factors of race, residence, wealth, occupation or failure to possess a status such as parenthood or property ownership constituted invidious discrimination violative of the Equal Protection Clause of the 14th Amendment. (See: *Gray v. Sanders,* 372 US 368 (1963) (residence); *Reynolds v. Sims,* 377 US 533 (1964) and a series of reapportionment decisions (residence); *Carrington v. Rash,* 380 US 89 (1965) (occupation and residence); *Harper v. Virginia Bd. of Elections,* 383 US 663 (1966) (wealth); *Avery v. Midland County,* 390 US 474 (1968) (residence); *Kramer v. Union Free School Dist.,* 395 US 621 (1969) (parenthood and property ownership); *Cipriano v. Houma,* 395 US 701 (1969) (property ownership).)

In *Gray v. Sanders, Avery v. Midland County, Reynolds v. Sims,* and other reapportionment cases, all involving the equal representation per equal population principle, the Court evolved and applied the one man, one vote concept. In the balance of the cited cases the Court did not discuss this concept but found an exclusion from the voting franchise which constituted invidious discrimination in the absence of a showing that such exclusion was necessary to promote a compelling state interest.

In another series of decisions where dilution or denial of voting rights was asserted on the equal population principle and otherwise, the Court found no invidious discrimination and refrained from applying, or specifically rejected the application of the one man, one vote concept. (See: *Forston v. Dorsey,* 379

US 433 (1965); *Forston v. Morris,* 385 US 231 (1966); *Sailors v. Kent Board of Education,* 387 US 105 (1967); *Dusch v. Davis,* 387 US 112 (1967); *McDonald v. Bd. of Election Comrs. of Chicago,* 394 US 802 (1969); *Detroit Edison Co. v. Township School Dist.,* 378 F 2d 225 (1967) (cert. den.), 389 US 932.)

From these decisions by this Court, two legal patterns clearly emerge in voting cases. One is that in voting for representation in legislative assemblies, equal protection demands that equal population receive equal representation without regard to race, sex, economic status or place of residence, in short, in such cases, one man, one vote. The other is that exclusions from the voting franchise will be rigidly scrutinized by this Court and unless found necessary to promote a compelling state interest, such exclusions will be stricken as being violative of equal protection guaranties.

Another subsidiary legal pattern that clearly emerges from the decisions is that the one man, one vote concept is a confined concept and is not a judicial instrument to be indiscriminately used or applied in voting cases irrespective of the situation examined by the Court and this is where the Court below fundamentally erred. Thus, the Court states 170 SE 2d, page 790:

> "We are of the opinion that the one person one vote principle is now firmly established in broad general terms without qualification or exception."

This statement by the West Virginia Court was made in disregard of this Court's own discriminating

inclusionary and exclusionary application of the principle and also in disregard of this Court's caveats with reference to particular applications of its general pronouncements as expressed in *Gomillon v. Lightfoot*, 364 US 339 at page 344 (1960):

> "Particularly in dealing with claims under broad provisions of the Constitution, which derive content by interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts."

And in *Baker v. Carr*, 369 US 186 at page 217 (1962):

> "The cases we have reviewed show the necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloging."

As Mr. Justice Holmes once observed, "General propositions do not decide concrete cases." (*Lochner v. New York*, 198 US 45, 76 (1905).) The ultimate test under the Equal Protection Clause is whether a person has been in fact denied as a person the equal protection of the law. Discrimination in the law against persons which reflects no policy but which is arbitrary and capricious, and hence invidious, violates the Equal Protection Clause. However, when a voting law treats all persons subject to its terms equally as persons, there can be no invidious discrimination or denial of equal protection and the one man, one vote

instrument has no utility in the particular case. That is the situation here.

As this Court is thoroughly aware, the historical background and the circumstances of its adoption reveal the basic intendment of the Equal Protection Clause was to insure that persons would not be discriminated against or be subjected to oppressive treatment because of their race. And the rational development of that protection throughout the years brought within its orbit all governmental laws or actions whereby persons are discriminated against because of the possession of attributes, qualities or relationships by which persons are identified, distinguished and classified, such as race, creed, sex, residence, economic status, occupation, or association. But there is no such classification of persons or discrimination against persons or groups of persons involved in this case, either directly and obviously or sophisticatedly.

Neither the subject provisions of the Constitution and statutes of the State of West Virginia or of the State of California deny any person the right to vote and each vote is fully counted. In a semantic sense but certainly not in any invidiously discriminatory sense, there is weighting of votes under an extra-majority vote requirement, just as there must be weighting of votes under a majority vote requirement if a result is to be achieved. Thus, when 10 persons vote, 7 votes are required to affirm in a two-thirds vote requirement, 6 votes in a three-fifths vote requirement and also 6 votes in a majority vote re-

quirement. If 5 persons vote "yes" and 5 persons vote "no," the "no" vote is accorded full weight and the "yes" vote is accorded no weight at all under all three vote requirements even though the votes are equal. But no person's vote is weighted because he is a particular person or because he possesses or fails to possess particular attributes, qualities, status, or associations or because he resides in a certain place. The law is completely neutral as to these factors and as to persons, and each person votes under the law equally subject to its advantages and disadvantages. The Equal Protection Clause does not guaranty any person or group a right to prevail in a bond election and a law that operates indiscriminately sometimes in favor of some persons and sometimes in favor of others does not violate either the letter or spirit of the Clause.

What is involved here is simply a required procedural step in the process of the incurrence of long range indebtedness by the political subdivisions of the state, a matter that vitally affects the fiscal and economic interests of the state as a whole and one that is completely subject to the control of the sovereign people of the state who could grant the privilege to the local entities or withhold it at will. And the method of control adopted is, by that governmental mechanism which as observed by the Supreme Court of the State of Idaho in *Bogert v. Kinzer, supra,* "lies at the very foundation of our government."

The extra-majority vote requirement is not a mechanism of government conceived in prejudice or

sophisticatedly cloaked to conceal discriminatory evils. It is rather a method of governmental control against precipitate, impulsive and improvident majority action so universally adopted in wisdom and good faith by persons without malevolent intent and so permeative of our democratic governmental structure and so uniformly sustained by the judiciary that it is startling that it is now even suspect. It is not argued that mere historical existence determines equal protection concepts. But it is argued that it would take a strong and convincing demonstration that a method of voting which has historically and universally permeated our laws and judicial system for the past almost 200 years does now, at this time, constitute invidious discrimination. No decision of this Court compels this conclusion and no such demonstration was made in the Court below, nor could it be, as the simple fact is that there is no invidious discrimination and no denial of equal protection of the law under the subject constitutional and statutory provisions.

The principles determinative of this case are those adopted by this Court in the case of *McDonald v. Bd. of Election Comrs., supra,* wherein the Court stated as follows, 394 US pp. 807, 808, 809:

> "Such an exacting approach is not necessary here, however, for two readily apparent reasons. First, the distinctions made by Illinois' absentee provisions are not drawn on the basis of wealth or race. Secondly, there is nothing in the record to indicate that the Illinois statutory scheme has an impact on appellants' ability to exercise the

fundamental right to vote. It is thus not the right to vote that is at stake here but a claimed right to receive absentee ballots. . . . Faced as we are with a constitutional question, we cannot lightly assume, with nothing in the record to support such an assumption, that Illinois has in fact precluded appellants from voting. We are then left with the more traditional standards for evaluating appellants' equal protection claims. Though the wide leeway allowed the States by the Fourteenth Amendment to enact legislation that appears to affect similarly situated people differently, and the presumption of statutory validity that adheres thereto, admits of no settled formula, some basic guidelines have been firmly fixed. The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal. Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them. See McGowan v. Maryland, 366 US 420, 6 L Ed 2d 393, 81 S Ct 1101 (1961); Kotch v. Board of River Port Pilot Commissioners, 330 US 552, 91 L Ed 1093, 67 S Ct 910 (1947); Lindsley v. Natural Carbonic Gas Co., 220 US 61, 55 L Ed 369, 31 S Ct 337 (1911)."

V

CONCLUSION

For the reasons herein set forth, it is respectfully submitted that this Court should reverse the judgment of the Supreme Court of Appeals of West Virginia which held that the three-fifths vote requirement of Article X, Section 8 of the Constitution of West Virginia and Sections 4 and 14 of Article 1, Chapter 13, Code, 1931, as amended, and also the sixty percent requirement of Article X, Section 1 of the Constitution of West Virginia and Section 16 of Article 8, Chapter 11, Code, 1931, as amended, to be in conflict with and violative of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

Dated, San Francisco, California,
May 18, 1970.

Respectfully submitted,

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(Appendices Follow)

PROPOSITIONS SUBMITTED TO VOTERS—Con

County	PROPOSITION 3 — OPEN SPACE CONSERVATION. Legislative Constitutional Amendment. Authorizes Legislature to define open space lands; provide restrictions to use thereof for recreation, scenic beauty, natural resources, or production of food or fiber; and establish basis of assessment of such lands.		PROPOSITION 4 — INDEBTEDNESS OF LOCAL AGENCIES. Legislative Constitutional Amendment. Provides that instead of a two-thirds vote to incur an indebtedness at an election held for that purpose, any local general obligation bonds for library purposes or public school purposes, may be approved by sixty percent of the qualified electors voting on such proposition at a primary or general election, including this election.	
	Yes	No	Yes	No
	213,553	103,223	153,665	155,383
	104	71	92	79
	2,329	1,548	1,645	2,097
	16,913	14,926	14,732	17,154
	2,349	2,007	1,653	2,596
	2,206	1,201	1,290	2,003
Costa	111,849	57,170	80,607	83,575
Norte	1,346	2,536	1,364	2,370
	6,540	5,656	4,715	7,227
	66,940	39,723	49,854	56,242
	3,393	2,167	2,268	3,169
	10,137	16,548	12,294	13,878
	8,551	6,167	5,859	8,526
	2,249	2,437	1,877	2,666
	50,210	35,972	32,408	51,795
	8,269	5,307	6,416	6,836
	4,034	2,835	2,722	3,973
	2,782	1,928	1,934	2,700
	972,173	953,937	883,041	1,006,077
	5,997	4,366	4,574	5,502
	44,666	20,508	29,569	33,948
	1,188	1,102	1,012	1,244
	6,908	6,367	4,927	8,006
	12,820	7,274	9,687	10,078
	1,139	1,166	904	1,298
	665	601	557	665
	36,191	15,488	27,505	22,559
	16,310	8,539	10,151	13,915
	5,251	3,873	3,856	4,995
	162,975	190,264	152,173	191,029
	13,832	8,659	9,409	12,866
	2,535	1,753	1,822	2,323
	67,221	44,150	52,210	56,856
	120,650	67,092	86,905	100,620
	3,256	1,367	1,342	3,173
Benito	69,764	90,919	74,603	82,383
Bernardino	187,066	159,372	182,263	158,510
Diego	138,990	79,846	103,623	110,626
Francisco	48,133	27,780	32,865	42,019
Joaquin	12,818	15,072	12,432	14,913
Luis Obispo	98,264	74,230	76,187	93,320
Mateo	41,825	27,661	29,803	37,776
Barbara	160,785	101,274	114,331	144,512
Clara	22,020	14,645	16,436	19,996
Cruz	13,663	9,520	8,786	13,869
	546	360	409	443
	6,296	4,065	4,738	5,218
	22,129	15,838	19,673	17,622
	35,850	20,875	25,258	30,647
	28,035	19,352	26,070	21,407
	5,600	5,596	3,862	7,072
	5,123	3,276	3,214	4,859
	1,160	1,425	985	1,516
	26,674	16,518	19,163	23,100
	3,409	3,242	2,699	3,784
	39,049	42,283	36,469	42,709
	15,305	6,698	10,863	10,812
	4,100	4,162	2,944	5,117
	2,974,135	2,381,937	2,462,715	2,789,653

Appendix B

SECTION 26 OF THE CHARTER OF THE CITY AND COUNTY OF SAN FRANCISCO

"The city attorney shall be an elective officer and shall receive an annual salary of ten thousand dollars ($10,000). He shall furnish an official bond in the sum of ten thousand dollars ($10,000). He shall appoint and at his pleasure may remove, all assistants and employees in his office. He shall devote his entire time and attention to the duties of his office. He must, at the time of his election, be an elector of the city and county, qualified to practice in all the courts of this state, and he must have been so qualified for at least ten years next preceding his election. [*Salary of city attorney now subject to Section 151.1.*]

"The city attorney must represent the city and county in all actions and proceedings in which it may be legally interested, or, for or against the city and county, or, any officer of the city and county in any action or proceeding, when directed so to do by the supervisors, except where a cause of action exists in favor of the city and county against said officer. Whenever any cause of action exists in favor of the city and county, the city attorney shall commence the same when within his knowledge or when directed so to do by the supervisors. He shall give his advice or opinion in writing to any officer, board or commission of the city and county when requested. Except as otherwise provided in this charter, he shall not settle or dismiss any litigation for or against the city and

county, unless, upon his written recommendation, he is ordered so to do by ordinance.

"The city attorney shall prepare, or approve as to form, all ordinances before they are enacted by the supervisors. He shall approve, by endorsement in writing, the form of all official or other bonds required by this charter or by ordinance before the same are submitted to the proper commission, board or office for final approval, and no such bonds shall be finally approved without such approval as to form by the city attorney. Except as otherwise in this charter provided, he shall prepare in writing the draft or form of all contracts before the same are executed on behalf of the city and county. He shall examine and approve the title of all real property to be acquired by the city and county.

"He shall keep on file in his office copies of all written communications and opinions, also all papers, briefs and transcripts used in matters wherein he appears; and books of record and registers of all actions or proceedings in his charge in which the city and county or any officer or board thereof, is a party or is interested."

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MAY 18 1970

JOHN F. DAVIS, CLERK

No. ~~1011~~ 96

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

A. T. GORDON, ET AL.,

Petitioners,

vs.

GRANVILLE H. LANCE, ET AL.,

Respondents.

Petitioners's Brief

Petitioners' Brief in Support of Writ of Certiorari to the Supreme Court of Appeals of the State of West Virginia

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May 1970

Petition for Certiorari Filed February 26, 1970
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No. 1244

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

A. T. GORDON, ET AL.,

Petitioners,

VS.

GRANVILLE H. LANCE, ET AL.,

Respondents.

Petitioners' Brief in Support of Writ of Certiorari to the Supreme Court of Appeals of the State of West Virginia

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OPINION BELOW

The opinion of the Supreme Court of Appeals of the State of West Virginia is reported in 170 *S. E. 2d* 783, and set forth in it entirety in *Appendix*, page 22a.

JURISDICTION

This Court's jurisdiction is invoked under Title 28 *U.S.C.*, Section 1257 (3). The final judgment of the Court below denying Petitioners' Motion for Rehearing was entered on December 2, 1969, and is set forth in its entirety in *Appendix*, page 2a. Petition for Writ of Certiorari was filed herein on February 26, 1970, and within 90 days from and after the date of entry of said judgment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of West Virginia, Article X, Section 1 and Article X, Section 8; West Virginia Code, 1931, as amended, Chapter 13, Article 1, Section 4; West Virginia Code, 1931, as amended, Chapter 13, Article 1, Section 14; West Virginia Code, 1931, as amended, Chapter 11, Article 8, Section 16, are all set forth so far as pertinent in *Appendix*, pages 70a, 71a, 72a, 73a and 74a, respectively. These provisions establish that boards of education and other political subdivisions of the State of West Virginia prior to the issuance of general obligation bonds must submit the question of the issuance thereof to the voters of said subdivision and require the approval of three-fifths of the persons voting thereon before the issuance can be authorized and further establish the principle that local tax levying bodies cannot levy in excess of the rates established in the Constitution without submitting the proposal to the voters of the political subdivision and without receiving the approval of 60 per cent of the persons voting thereon.

QUESTIONS PRESENTED FOR REVIEW

1. Do the three-fifths vote requirement of the West Virginia Constitution and the statutes dealing with elections held by political subdivisions of the state for determination of whether bond indebtedness should be incurred, and the 60 per cent vote requirement provided by the West Virginia Constitution and statutes relating to elections to authorize local tax levying bodies to make additional levies for tax purposes in excess of levy rates provided for in the Tax Limitation Amendment to the West Virginia Constitution, conflict with and violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

2. Does "equal protection of the laws" mean "majority rule" in elections concerning bonded indebtedness or tax levies?

STATEMENT OF THE CASE

On April 29, 1968, the Respondent, The Board of Education of the County of Roane, a governmental corporation and a political subdivision of the State of West Virginia, submitted to the voters of Roane County a proposal calling for the issuance of general obligation bonds in the amount of $1,830,000 to be retired over a period of not more than twenty (20) years from the date of issuance thereof, with interest not exceeding 5½ per cent per annum for the purpose of constructing new school buildings and making other improvements to the educational facilities of Roane County. On the same date by separate ballot there was also submitted to the voters of Roane County a proposal to authorize the Board of Education to lay additional tax levies in excess of the constitutionally authorized rates for a period of five (5) years, the proceeds of which were to be used for current expenditures and capital improvements. A canvass of the results of the election disclosed that 2,887, or 51.55 per cent of the total votes cast on the question of the issuance of bonds, favored the issuance thereof, and that 2,866, or 51.51 per cent of the total votes cast on the question of authorizing the additional tax levies, favored the additional levies. The canvassing authority, under the constitutional and statutory provisions quoted hereinabove, concluded that each proposal did not obtain the necessary affirmative votes and declared that both issues had failed of passage. [Plaintiffs' Complaint, *Appendix*, page 4a.]

Thereupon, Respondents, Granville H. Lance, Fred

Hill, Chester C. Dodd, Jr., Brady D. Hickel, Jr., and Joe Craddock, plaintiffs below, appeared before the Board of Education as citizens, voters and taxpayers of Roane County and spoke in their own behalf and, purporting to speak on behalf of all other persons who voted in the affirmative on each of the issues submitted, demanded that the Board authorize the issuance and sale of the bonds and that the Board lay the additional tax levies notwithstanding the constitutional and statutory provisions to the contrary. They then asserted that the statutory and constitutional provisions above quoted violated the equal protection clause of the Fourteenth Amendment to the United States Constitution and also violated the provisions of Article IV, Section 4 of the Constitution of the United States which guarantees to every state a republican form of government. The Board, of course, refused to grant the demands of the plaintiffs below. [Plaintiffs' Complaint, *Appendix*, page 4a.]

Shortly thereafter the said Respondents, plaintiffs below, instituted two separate declaratory judgment actions in the Circuit Court of Roane County, the first seeking a declaration that the constitutional and statutory provisions above quoted pertaining to the issuance of general obligation bonds, and the second seeking a declaration that the constitutional and statutory provisions concerning the laying of excess levies, each be declared unconstitutional and void as violative of the Fourteenth Amendment and of Article IV, Section 4 of the Constitution of the United States. The actions were consolidated and after the Circuit Court of Roane County ruled contrary to their position and sustained the defendants' (Respondents herein) Motion for Judgment on the Pleadings [*Appendix*, page 18a], plaintiffs

below appealed the consolidated action to the Supreme Court of Appeals of the State of West Virginia. The result of this appeal was the opinion of the said Court set forth in *Appendix*, page 22a, which sustained plaintiffs' position and adjudicated that the above quoted provisions of the Constitution and statutes of the State of West Virginia violated the Fourteenth Amendment to the Constitution of the United States and were therefore unenforceable and void.

When this decision was announced, your Petitioners, as citizens, voters and taxpayers of Roane County, moved to intervene as additional parties defendant to prosecute a motion for rehearing and if necessary a further proceeding by writ of certiorari to this Court. Your Petitioners were permitted to intervene as additional parties defendant and after status as defendants was obtained, Petitioners' Motion for Rehearing on the merits was denied by order set forth in *Appendix*, page 2a.

There were no factual issues raised in the pleadings by the original parties defendant. The case was presented for decision both to the Circuit Court of Roane County and to the Supreme Court of Appeals of the State of West Virginia on the pure question of law involving the constitutionality and validity under the United States Constitution of the extraordinary majority requirements of the Constitution and statutes of the State of West Virginia which are conditions precedent to the issuance of general obligation bonds and to the laying of tax levies in excess of the limitations prescribed by the Constitution and enabling statutes of the state. The Supreme Court of Appeals of the State of West Virginia held, in short, that the extraordinary-

majority requirements above mentioned violated the equal protection clause of the Fourteenth Amendment as expounded by this Court in the famous "one person, one vote" decisions. It held, over the vigorous dissent of Judge Haymond, that the "one person, one vote" cases and the equal protection clause require that every election be decided by a simple majority; otherwise, every person who votes in the affirmative on a proposal which requires a super-majority for passage is discriminated against by the "unlawful weighting" or "dilution" of his vote [see *Appendix*, page 22a].

ARGUMENT

This case has been placed on the Summary Docket for disposition, and, accordingly, this argument will be unprotracted. The question presented here is utterly novel. So far as we can ascertain there is no clear precedent upon which to base a decision on either side of the question, save this case itself as resolved by the lower court and other more recent decisions which we will discuss presently.

The reason for the total lack of precedent on this question is that the soundness of the extraordinary-majority requirements invalidated by the lower court has never before been questioned. The suggestion that "equal protection of the laws" means "majority rule" has never before been seriously made to, or seriously considered by, a court of last resort in any jurisdiction. Majoritarian principles do not and have not generally prevailed in our system of self-government. In fact, the very stability of our Republic, and the philosophical foundation of the Great American Experiment, is derived from a unique combination of nonmajoritarian principles—the doctrine of separation of powers, the

executive veto, plurality elections, bicameral legislatures, and judicial supremacy are classic examples. These principles, to a greater or lesser degree, are expressed not only in the Federal Constitution, but in the basic law of all of the fifty states. They are firmly rooted historically. James Madison, in *The Federalist (The Federalist* No. 43, at page 278 [New American Library Ed. 1961]), explained that the reason an amendment to the Constitution requires an extraordinary majority is that "[i]t guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults".

Historically, politically, and judicially, the power of minority veto, the antithesis of "majority rule," is beyond responsible criticism. It has served this nation well and vested it with a stability not disturbed by transient majorities. We urge that it remain so. Reduced to its true intent, the argument asserted by the Respondents is that the political theory of the basic law of the State of West Virginia should be altered by judicial decree to one of strict majoritarianism. Their contention, erroneously adopted by the Court below, has nothing to do with injustice, or discrimination, or political inequality, or with any other constitutionally proscribed practice. They urge a drastic change of our theory of government. The Fourteenth Amendment contains no such commandment.

One Man, One Vote

In a proper but fruitless search for controlling precedent, the Court below relied for its decision upon the various rulings of this Court referred to collectively as the "one man, one vote" cases. These several cases

involved factual situations not remotely similar to ours. Here, there has been no "fencing out" of any voter from the election process. Here, there has been no "weighting" or "dilution" of the vote of any voter when compared with the vote of every other voter. As Judge Haymond observed in his dissent, "Each voter in that election cast one vote and each vote so cast was counted as one vote for one voter". [*Appendix*, page 59a]. To attempt to employ the principle enunciated in the "one man, one vote" cases to invalidate an extraordinary-majority requirement in an election to decide the issuance of general obligation bonds is comparable to an attempt to use the rules of arithmetic to teach spelling. It is a problem of semantics. See "What Has the Supreme Court Taught?", 72 *W. Va. Law Review* 1. The Respondents herein, and the Court below, became so hypnotized with the phrase "one man, one vote" that they ignored both the realities of its applicability and the constitutional foundation upon which it rests. "Equal protection of the laws" and "majority rule" are wholly distinct concepts. The former is a constitutionally guaranteed right of citizenship, while the latter is a political theory, a vastly different thing.

This Court has repeatedly stated, most recently by Mr. Justice Black in *Hadley* v. *Junior College District*, ... U.S. ....., 25 *L. Ed. 2d* 45, at page 50 (decided Feb. 25, 1970), that in determining the applicability of the "one man, one vote" rule, "the crucial consideration is the right of each qualified voter to participate on an equal footing in the election process". This test was met in the Roane County election. The right of equal participation in the election process is now established as a fundamental right, but it does not carry with it a constitutional right to win an election, even though one

receives the most votes. The case of *Fortson* v. *Morris*, 385 *U. S.* 231, 17 *L. Ed. 2d* 330, 87 *S. Ct.* 446, totally ignored by the court below, so held. If a candidate for Governor who receives more votes than any other candidate has no constitutional right to win the election, how can the proponents of a bond issue claim a greater right? In the *Fortson* case, this Court refused to distort the "one man, one vote" rule, notwithstanding the eloquent dissent of Mr. Justice Fortas, and held that the Constitution does not purport to fix methods by which the several states must elect public officials so long as every qualified voter is treated with equality. So here, it must be admitted, the Constitution does not purport to fix methods which the people of a state must follow to regulate the fiscal affairs of its political subdivisions so long as every voter is treated equally with every other voter.

In all of the "one man, one vote" cases a particular class of voters was either disenfranchised or discriminated against because of place of residence or other status-producing factor, and in all such cases the class subject to the discrimininationwas demonstrable prior to the election. No such situation exists here and no such class of individuals exists here. The Court below erroneously concluded that the 60 per cent requirement had the effect of creating a class of "affirmative voters" subject to discrimination. This conclusion is patently unsound since a person who votes in the affirmative on one bond issue may vote in the negative on the next. Thus, the so-called "class" would change according to the merits of the proposal and the inclination of the voter. There could be no prospective "discrimination". The inclusion of the individual within this "affirmative voter" classification would depend solely on the way

he decides to vote on the matter in issue and the election is concluded before the "class" is defined. (See "Extraordinary Majority Voting Requirements," 58 *Georgetown Law Journal*, page 411.)

The fact is, and we urge the Court to so hold, that extraordinary-majority requirements such as those in the instant case do not result in class legislation or discrimination in any form, but rather are based on neutral principles. They make no distinction between individuals or classes of individuals. They are rooted in the political ideal of relative stability in a given area of governmental action and all citizens stand equally before them. In truth, the people have reserved to themselves certain legislative powers and have refused to delegate or entrust those powers to the officers of certain political subdivisions. No constitutional provision prohibits such a reservation of powers. In the case of *Hunter* v. *Erickson*, 393 *U. S.* 385, 21 *L. Ed. 2d* 616, 89 *S. Ct.* 557, Mr. Justice Harlan, in a concurring opinion, stated:

> "This same analysis applies to other institutions of government which are even more solidly rooted in our history than is the referendum. The existence of a bicameral legislature or an executive veto may on occasion make it more difficult for minorities to achieve favorable legislation; nevertheless, they may not be attacked on equal protection grounds since they are founded on neutral principles. Similarly, the rule which makes it relatively difficult to amend a state constitution is commonly justified on the theory that constitutional provisions should be more thoroughly scrutinized and more soberly considered than are simple statutory enactments". [393 *U. S.*, at 394-395.]

In our case, the people of West Virginia decided by majority vote, by provision in the basic law of the state,

that none of its political subdivisions should incur general obligation, long-term indebtedness, or levy taxes beyond specified rates, without approval of 60 per cent of the voters at an election specially called. Again, in 1966, the people of the state decided by majority vote to retain this three-fifths requirement in their Constitution [*Appendix*, page 67a]. They recognized the desirability of preventing burdensome indebtedness and excessive taxation without approval of an extraordinary majority. Unlike ordinary legislation, a bond issue, once done, cannot be undone. It obligates future voters, future property owners and taxpayers, and possibly even persons unborn at the time of the election. Stability and restraint throughout the State were thought desirable because reputation for fiscal integrity cannot be localized. If one political subdivision of this state were to default on a general obligation bond it would seriously and adversely affect the credit rating and salability of bonds of every other political subdivision and even of the state itself. To assert that such a reservation of legislative power, and such a restriction on fiscal irresponsibility, constitutes class legislation and discriminates against a particular class of individuals is to engage in heights of illogic.

Two other recent cases deal specifically with this question. A Three-Judge District Court in Minnesota in the case of *Rimarcik* v. *Johansen*, ... *F. Supp.* ....., 38 *U.S.L.W.*, page 2453 (Feb. 4, 1970), invalidated on equal protection grounds a Minnesota statute requiring a 55 per cent affirmative vote to pass a home-rule charter amendment to permit sale of liquor on a local-option basis. That Court held that such a requirement was discriminatory and it could perceive no compelling state interest to justify it. On the other hand, the Supreme

Court of the State of Idaho, in the case of *Bogert* v. *Kinzer*, 465 *P. 2d* 639 (Idaho, Feb. 17, 1970), upheld the validity of constitutional provisions of that state which require an affirmative vote of two-thirds of the persons voting to authorize the issuance of general obligation bonds. In a scholarly opinion by Judge Shepard, that Court specifically rejected both the language and the reasoning of the Supreme Court of Appeals of West Virginia in the case at bar. It held that a concensus amounting to more than a simple majority is not only desirable but necessary at certain times and in certain circumstances. It also held that the judicial branch of government should not make a determination between competing political theories when the people and the legislature have spoken. Our case demands an identical result.

Apparently, the Respondents have recently recognized the tenuity of their case. On pages 5 and 6 of Respondents' Brief in Opposition to the Petition for Writ of Certiorari we find the following statement: "The Fourteenth Amendment neither compels nor forbids a majoritarian principle . . ." If this is true, and it is, what is this case all about? Would they have every election decided by the toss of a coin? The Constitution does not compel a majoritarian principle, and it does not forbid an extraordinary-majority requirement.

CONCLUSION

For the reasons stated, we respectfully submit that the extraordinary-majority requirements of the Constitution of the State of West Virginia, and of the enabling statutes enacted pursuant thereto, are valid and enforceable, and that the judgment of the Supreme Court of Appeals of West Virginia should be reversed.

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Attorney for Petitioners

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 96

A. T. GORDON, et al.,
Petitioners and Intervening
Defendants Below,

vs.

GRANVILLE H. LANCE, et. al.,
Respondents and Plaintiffs Below,

and

THE BOARD OF EDUCATION OF THE COUNTY OF ROANE,
a Corporation, et al.,
Respondents and Defendants Below.

BRIEF

Of Chas. Claflin Allen as Amicus Curiae

STATEMENT

This amicus curiae is a practicing lawyer in St. Louis and St. Louis County for a number of years and has been concerned with the issuance and collection of bonds of counties, cities, school districts and other districts. There is now pending in the District Court in the City of St.

Louis a case entitled, **Preisler v. Mayor of the City of St. Louis** and two companion cases consolidated with it, attacking the requirement of the Constitution and Statutes of Missouri of a two-thirds majority vote to approve bond issues and to approve school taxes in excess of the constitutional rate. This amicus has been appointed by the District Court as amicus curiae in those cases. That court has stayed its decision pending a decision in this case.

The briefs of the petitioners for the writ of certiorari in the case at bar and of amici curiae from California, have fully discussed the principles involved in this case, which it is not necessary for this amicus to repeat. This brief will make only one point dealing with the inapplicability of the Equal Protection Clause in cases where the public policy of the state is involved and will briefly give the history of the difficulties in Missouri which gave rise to the two-thirds vote requirement, and which show that policy.

POINTS AND AUTHORITIES

Point I

The Fourteenth Amendment Does Not Apply to an Important Public Policy of the State Which Has a Rational Relationship to a Legitimate State End.

McDonald v. Board of Election Commissioners, 394 U. S. 802.

Point II

The Constitution of Missouri Requires the Consent of at Least ⅔ of the Voters Voting at an Election Prior to the Issue of Bonds of Counties, Cities, School Districts and Other Political Corporations.

Sec. 26 of Article VI of Annex hereto.

ARGUMENT

This court in the case of **McDonald v. Board of Election Commissioners**, 394 U. S. 802, a case involving an inmate of a jail who was denied by the statute the right to an absentee ballot to vote in an election, in the opinion by Chief Justice Warren, said,

> "Though the wide leeway allowed the States by the Fourteenth Amendment to enact legislation that appears to affect similarly situated people differently, and the presumption of statutory validity that adheres thereto, admits of no settled formula, some basic guidelines have been firmly fixed. The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal. Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them." (394 U. S., l. c. 808-9.)

The historical background of this Missouri constitutional requirement of a two-thirds majority vote for bond issues is enlightening. Until 1865 there was no constitional provision requiring an election to be held either by the state or by the counties, cities or other political subdivisions prior to the issuance of bonds.

In the 1830's the country entered into an era of railroad building and bond issues for millions of dollars were issued in aid of constructing railroads for which the railroad companies issued their bonds.

By the end of the Civil War many bonds issued to or for the railroads were in default. As a result of these

experiences, the constitution of 1865 by Article XI, Section 13 provided for the first time that the state should not become a stockholder in any private corporation except to secure loans theretofore extended to certain railroad corporations. Section 14 of the same Article also provided that no county, city or town should become a stockholder in or loan its credit to any corporation unless two-thirds of the qualified voters of the county, city or town assented thereto. In 1868 the "Township Aid Act" was passed requiring a two-thirds majority of the voters who voted at the election.

A number of counties, townships and other public corporations issued bonds and delivered them to railroad promoters and they were sold throughout the east to holders in due course. In a number of cases, after selling the bonds, the promoters did not complete the railroad.

In 1873 a severe depression hit the country and litigation arose over the validity of the bonds.

A number of holders of these bonds obtained judgments in the Federal courts against several counties on the ground that the plaintiffs were holders in due course and the bonds contained recitals that all the requirements of law had been complied with although the counties had not gotten the railroad. The only remedy of these judgment creditors was mandamus to compel the county courts to levy taxes to pay the judgments. When such orders were issued the county judges frequently resigned, leaving the county without a county court; some county officials spent time in jail for contempt.

For years these judgments went unpaid; but all were ultimately refunded at a compromise figure by new bonds which were voted by the required two-thirds majority and matured serially over a 20-year period. The last county

to refund its railroad aid judgment was St. Clair County, which issued refunding bonds in 1918 and which were all paid by 1938.

In the meanwhile, the state constitution of 1875 carried forward the requirements of the two-thirds vote. Section 12 of Article X provided that "no county, city, town, township, school district or other political corporation or subdivision of the state shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year without the consent of two-thirds of the voters thereof voting on such proposition at an election to be held for that purpose; * * * and provided further, that any county, city, town, township, school district or other political corporation or subdivision of the state incurring an indebtedness requiring the consent of the voters as aforesaid shall, before or at the time of doing so, provide for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due and also to constitute a sinking fund for the payment of the principal thereof, within 20 years from the time of constructing the same: . . ."

This constitution also provided limitations on the amount of indebtedness which might be so incurred, based on a percentage of the assessed valuation.

Article VI, Section 26 of the Constitution of 1945 carries forward these provisions requiring a two-thirds vote of the qualified electors voting on the proposition before the political corporation may become indebted in excess of the income and revenue for the year. Section 26(f) requires that before incurring any such indebtedness, provision must be made for the collection of an annual tax in whatever amount is needed, in order to be sufficient to pay the interest and principal within 20 years.

In an opinion by Mr. Justice Field in the case of **Vital Jarrolt v. City of Moberly**, 103 U. S. 580, l. c. 585, this court, speaking of the requirement of the Missouri Constitution of a two-thirds vote for the issuance of bonds, said,

> "The object of the inhibition in the state constitution was to prevent the creation of debts by counties, cities and towns on behalf of any company, association or corporation without the assent of two thirds of their qualified voters. The loan of their credit, that is, the placing of their obligation for the payment of money for the use of companies was the usual mode in which they incurred indebtedness. Aid in this way to companies, particularly such as were organized for the construction of railroads, was given so frequently by municipal bodies in Missouri, before the Constitution of 1865 went into effect, as in many instances to greatly embarrass and subject them to burdensome and oppressive taxation to provide for the interest on their obligations and the ultimate payment of the principal."
>
> "Numerous Acts of the Legislature had authorized officers of counties and cities to subscribe for stock in railway companies, and to issue bonds for their aid without limit as to amount and without the previous assent of those who were to be taxed for their payment. In many instances the road, in aid of which the bonds were issued, was never constructed, and as no benefit resulted to the counties and cities, their inhabitants naturally felt impatient under the burdens which their officers had improvidently imposed."

It will thus be seen that the requirement of a two-thirds vote before the issuance of bonds and of tax levies for their payment, without limitation as to rate, has been part of the established fiscal policy of the State of

Missouri for 100 years. This policy has resulted in the fact that bonds of cities, counties and school districts in Missouri have enjoyed a high standing in the financial markets of the country with the resulting relatively low interest cost.

The contrary ruling would lead into a morass. For example, Sec. 3 of Article VI of the Missouri Constitution provides that two or more counties may be consolidated by a vote of a majority of the qualified electors voting thereon in each county affected. If the respondents' position in this case should prevail, no two counties could be consolidated unless they happened to have the same population because each vote in the smaller county would have more "weight" than a vote in the larger.

It cannot be said that the requirement of a ⅔ majority has no rational relationship to a legitimate state end.

Respectfully submitted

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ANNEX

THE SUBSTANCE OF THE MISSOURI CONSTITUTIONAL PROVISIONS RELATING TO ELECTIONS AND BOND ISSUES

ARTICLE VI

Section 2. Two or more counties may be consolidated by a vote of a majority of the qualified electors voting thereon in each county affected.

Section 4. No county shall be divided or have any portion stricken therefrom except by vote of a majority of the qualified electors voting thereon in each county affected.

Section 7. A county may be disorganized by vote of two-thirds of the qualified electors of the county voting thereon, and when so dissolved all or portions thereof may be annexed to the adjoining county or counties as provided by law.

Section 8. No county seat shall be removed except by vote of two-thirds of the qualified electors of the county voting thereon at a general election, but no such vote shall be taken more than once in five years.

Section 10(a). No county, city, incorporated town or village, school district or other political corporation or subdivision of the state shall become indebted in an amount exceeding the income and revenue provided for such year, except as otherwise provided in this constitution.

Section 10(b). Any county, city, incorporated town or village, school district or other political corporation or subdivision of the state, by a vote of two-thirds of the qualified voters thereof voting thereon, may become indebted in an amount not to exceed 5% of the value of taxable tangible property therein as shown

Missouri for 100 years. This policy has resulted in the fact that bonds of cities, counties and school districts in Missouri have enjoyed a high standing in the investment markets of the country with the resulting extremely low interest cost.

The contrary ruling would lead into confusion. Briefly, Sec. 3 of Article VI of the Missouri Constitution provides that two or more counties may be consolidated by a vote of a majority of the qualified voters voting thereon in each county affected. If the respondents' action in this case should prevail, no two counties could be consolidated unless that happened to have the same population because each vote in the smaller county would have more "weight" than a vote in the larger.

It cannot be said that the requirement of a majority has no rational relationship to a legitimate state end.

Respectfully submitted

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ANNEX

THE SUBSTANCE OF THE MISSOURI CONSTITUTIONAL PROVISIONS RELATING TO ELECTIONS AND BOND ISSUES

ARTICLE VI

Section 3. Two or more counties may be consolidated by a vote of a majority of the qualified electors voting thereon in each county affected.

Section 4. No county shall be divided or have any portion stricken therefrom except by vote of a majority of the qualified electors voting thereon in each county affected.

Section 5. A county may be dissolved by vote of two-thirds of the qualified electors of the county voting thereon, and when so dissolved all or portions thereof may be annexed to the adjoining county or counties as provided by law.

Section 6. No county seat shall be removed except by vote of two-thirds of the qualified electors of the county voting thereon at a general election, but no such vote shall be taken more than once in five years.

Section 26(a). No county, city, incorporated town or village, school district or other political corporation or subdivision of the state shall become indebted in an amount exceeding the income and revenue provided for such year, except as otherwise provided in this constitution.

Section 26(b). Any county, city, incorporated town or village or other political corporation or subdivision of this state, by a vote of two-thirds of the qualified voters, voting
may become indebted in an amount not to exceed 5% of the value of taxable tangible property therein as shown

by the last completed assessment for state or county purposes except that a school district by a two-thirds vote of the qualified electors voting thereon may become indebted in an amount not to exceed 10% of such value.

Section 26(c). Any county or city by vote of two-thirds of the qualified electors voting thereon may incur an additional indebtedness for county or city purposes not to exceed 5% of the taxable tangible property shown as provided in Section 26(b).

Section 26(d). Any city by a two-thirds vote of the qualified electors voting thereon, may become indebted not exceeding in the aggregate an additional 10% of the value of the taxable tangible property shown as provided in Section 26(b) for the purpose of acquiring rights of way, constructing, extending and improving the streets and avenues and acquiring rights of way, constructing, extending and improving sanitary or storm sewer systems. This section further authorizes the governing body of the city to provide that all or any part of the cost of such improvement may be levied or assessed on the property benefited by the improvement and the proceeds shall be used to reimburse the city for the amount paid or to be paid by it on the bonds issued for the improvement.

Section 26(e). Any city by a vote of two-thirds of the qualified electors voting thereon may incur an indebtedness in an amount not to exceed an additional 10% of the value of the taxable property shown as provided in Section 26(b) for the purpose of paying the cost of purchasing or constructing waterworks, electric or other light plants to be owned exclusively by the city, provided the total general obligation indebtedness of the city shall not exceed 20%.

Section 26(f). Before incurring any indebtedness every city, town, village, school district or other political cor-

poration or subdivision of the state shall provide for the collection of an annual tax on all taxable tangible property therein sufficient to pay the interest and principal of the indebtedness as they fall due and to retire the same within 20 years.

Section 27. Any city, town or village by a vote of 4/7ths of the qualified electors voting thereon may issue negotiable interest bearing revenue bonds for the purchase of paying all or part of the cost of purchasing, constructing, extending or improving any revenue producing water, gas or electric light works, heating or power plants, or airports, to be owned exclusively by the city, the cost of operation and maintenance and the principal and interest of the bonds to be payable solely from the revenues derived from the operation of such utility.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 96

A. T. GORDON, ET AL.,

Petitioners,

vs.

GRANVILLE H. LANCE, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

BRIEF OF HAYES SMITH, AMICUS CURIAE

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———o———

BRIEF OF HAYES SMITH, AMICUS CURIAE

———o———

INTEREST OF AMICUS CURIAE

Section 10-702, R. R. S. Neb., a statute similar to West Virginia's 60% constitutional requirement, reads as follows:

> "No bonds shall be issued until the question has been submitted to the qualified electors of the district, and fifty-five per cent of the qualified electors

> voting on the question shall have voted in favor of issuing the same, at an election called for the purpose, upon notice given by the officers of the district at least twenty days prior to such election. * * *"

This law is the governmental control over the functions of the school board, emanating from the legislature, which is empowered by the Constitution of Nebraska, Sec. 6, Art VII, to provide for free education in the State of Nebraska.

Hayes Smith, the amicus, is a resident and property taxpayer of R. F. D., West Point, Cuming County, Nebraska. This brief amicus in support of the petitioners above is filed with the consent of the parties, as provided for in Rule 42(2) of this Court.

As a part of a new school building and facilities construction program in 1969, the school board of West Point School District, West Point, Nebraska, which levies a tax upon Hayes Smith, took various procedural steps to construct and finance new high school facilities. An election was set up under Nebraska statutes to submit to the 2300 registered voters of the school district the question of whether or not the district should issue general obligation bonds in the amount of $1,645,000 to pay for the new school and the accessories thereto. At that election 852 votes were cast in favor of the bond issue, 719 were cast against, and six ballots were spoiled and not counted.

Despite the fact that this vote did not result in the required 55% plurality in favor, a majority of the school board did move and adopt a resolution to proceed with the issuance of said bonds. These general obligation bonds create a tax lien upon the taxable properties of Smith and all others located within the school district, and can become payable over a thirty-year period. Shortly after the passage of this resolution, an injunction lawsuit was filed in the District Court of Cuming County, Nebraska, by Hayes Smith, the amicus curiae herein, to stop the issuance of these bonds, and at this time the District Court Judge has enjoined the issuance of the bonds on the grounds that the 55% statute is federally constitutional. The West Point School District has relied on the West Virginia appellate court decision, *Lance v. The Board of Education of Roane*, 170 S. E. 2d 779, now under consideration by your Court as *Gordon v. Lance, et al.*, Case No. 96, formerly No. 1244. The School District intends appealing to the State Supreme Court of Nebraska and probably to your court, if not successful at Nebraska level. The basic question of requiring more than a simple majority for approval of bonds is the same in this case as it is in the Hayes Smith injunctive lawsuit.

In addition, we do not feel that the majoritarian issue in this case can be decided in the abstract as the *Lance* case, supra, appears to have been at trial level. There are always factual reasons for laws enacted by the legislatures or adopted by constitutional committees that formulate the constitution for submission to the

people. There are only limited facts in the trial record of the trial. To have an important issue decided without factual reasons behind the statutory or the constitutional provision made a part of the trial court record by evidence or otherwise, in our judgment, is not a good example of an effective judicial process that protects the rights of all citizens, taxpayers, and minority citizens of the governmental unit involved. In order to determine whether rational and compelling state interests exist, such factors must be considered.

SUMMARY OF ARGUMENT

(1) The 55% plurality vote requirement for the issuance of school bonds provided for by Section 10-702, R. R. S. Neb., nor any reasonable percentage requirement, such as the 60% requirement in West Virginia, is not a violation of equal protection and the concept of one man, one vote. The long line of apportionment cases, beginning with *Baker v. Carr*, 369 U. S. 186 (1962), hold that a voter is denied equal protection of the law when his vote, in comparison to another vote in another district, is worth less because of the malapportionment of the legislative districts. These cases hold that every vote, in the election of public officials, must be counted the same as, and given equal weight in comparison to, each and every other vote. These cases do not hold that the one man, one vote concept demands that a state legislative body never impose a majority plus requirement in such special purpose elections as whether or not to incur

a 20 to 30 year bond indebtedness for the construction of educational facilities.

(2) The contention that the 55% plurality requirement of Nebraska or the 60% requirement of West Virginia amounts to a "discrimination" against and a "debasement" and "dilution" of the "yes" votes in the bond election is not, per se, prohibited by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. As long as there are rational, compelling state interests in maintaining such a situation, and the distinction made among the votes is not "invidious" or "arbitrary" and bear a reasonable relationship to a valid legislative objective, the provision is not constitutionally fatal.

(3) Imposition of judicial guidelines with regard to how Legislators, who are elected on a one man, one vote basis, provide for the funding of local educational facilities would be an intrusion into an area which is manifestly political in nature, and would constitute a violation of the doctrine of Separation of Powers. Local factors, considerations, and objections can only be adequately measured and provided for by state and local decision-making bodies.

(4) The valid, rational state interests and objectives in maintaining more than a majority requirement are as follows:

a. Election errors of all kinds do occur in sufficient quantity to invalidate up to 5% of the voting. Statutory remedies to correct or prevent these are an empty remedy at law for the aver-

age taxpayer in his battle against undue taxation by direct vote.

b. There is an ability to remove or correct in a relatively short time a mistake in judgment in selecting a public official by vote. This short term correction ability does not exist for correction of mistakes for imposition of a long-term tax to finance school construction.

c. Requiring more than a simple majority in decision-making processes for matters of substantial imposition is embedded in the Federal and State Constitutions and judicial process. The existence of the provision negates the idea that the doctrine of majoritarianism was so sacrosanct in the minds of the framers of the Constitution that it must be adhered to in every vote on every issue in every level of the political and legislative system

d. Governmental funds, personnel, and energy were in fact used in the West Point School District election, and probably will always be used in all school elections to promote what school officials want. Unless it is conceded that school officials always work in the best interests of society and are always right, such a situation cannot be tolerated. The only counter action to this is requiring more than a simple majority.

e. When alternative projects regarding tax imposition are not presented to the voters, requiring more than a simple majority is a reasonable requirement.

f. A 4.99% or more additional requirement is reasonable in dealing with a political question of direct imposition of taxes by vote. Such a decision is within the wisdom, function and duty of a legislative body, who is more skilled in im-

plementing the processes of our laws than the individual voter.

———o———

ARGUMENT

The issue here relates not to a method of state electoral apportionment, but solely to the right of a state to set whatever standards it deems desirable for the funding of local educational systems. Nothing in the Equal Protection Clause or elsewhere in the Federal Constitution expressly or impliedly supports the view that state legislatures must be judicially supervised in their judgment on matters of purely local concern. It must be emphasized that we are dealing here not with a general election, but with a limited special purpose election regarding long term taxes for public improvements and not public officials. Such special purpose governmental authorities such as school districts, exist in numerous sections of the county, and participation in such districts is undoubtedly limited in many instances to those who partake of the Districts' services and are assessed for its expenses. The constitutional validity of such a policy has heretofore been unquestioned. It is difficult to conceive how a legislative determination of the procedures by which educational institutions will be funded, as long as everyone is indeed permitted to express their views at the polls and there is a rational justification for such procedures, presents anything approaching a distinction of constitutional dimension. It must be pointed out that all the electors of the School District are eligible to vote in all state, local and federal elections in which general

governmental policy is determined. Each elector is fully able, therefore, to participate not only in the processes by which the requirements for School District voting may be changed, but also in those by which the levels of state and federal financial assistance to the District are determined. They are not locked into any self-perpetuating status of exclusion from the electoral process.

I. Equal Protection and One Man, One Vote

To hold that the one man, one vote principle set forth by the Supreme Court beginning with *Baker v. Carr*, 369 U. S. 186, invalidates the provision in question would place the judiciary in the midst of a "political thicket" clearly not envisioned by or within the purview of these decisions. In those cases, the Supreme Court held that the courts have jurisdiction to determine the constitutionality of statutes which provide for the selection of legislators (public officials) on the basis of unequal population apportionment, and has declared such statutes to be unconstitutional as a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. They also held that seats in the legislative branch of state governments must be apportioned substantially upon the basis of one person-one vote.

In *Reynolds v. Simms*, 377 U. S. 533, the court stated:

> "• • • we conclude that the equal protection clause guarantees the opportunity for equal participation by all voters *in the election of state legislators*." (Emphasis added.)

Gray v. Sanders, 372 U. S. 368, held that:

"• • • the idea that every voter in his state, *when he casts his ballot in favor of one of several candidates*, underlies many of our decisions." (Emphasis added.)

Wesberry v. Sanders, 376 U. S. 1, decided that an apportionment of congressional seats which contract the value of some votes and expands the value of others is unconstitutional, since:

"The federal constitution intends that *when qualified voters elect members of Congress each vote be given as much weight as any other vote* • • • no right is more precious in a free country than that of having a voice in the election of those who make the laws under which as good citizens, we must live." (Emphasis added.)

Additional quotations and citations from the leading apportionment cases would be redundant. It will suffice to say that in fact, and in law, the Nebraska provision in question is not inconsistent with the one person, one vote principle, and this principle was not violated at the school bond election at West Point in which the proponents of the additional levy and the bonds failed to obtain a vote of 55% in favor. The holding in all the above cited cases involved the constitutionality of legislative apportionment schemes, and such holdings are not applicable to the case at bar.

In pointing out what the reapportionment cases do not hold, Rudolph commented in "The Reapportionment Cases: A Conservative Defense of Individual Rights", 84 Neb. L. Rev. 854 (1964), that:

> "* * * Basically the criticism (of the reapportionment cases) is based on the false premise that the Court has been trying to establish democratic majoritarianism as the only form of government. The critics of the Court have complained that there was no purpose in equalizing the vote as long as gerrymandering, the seniority system, or any other limitation of majority rule exists. These critics have missed the point of the courts' protection of individual rights and property. The decision does not prevent the establishment of a system where a majority as large as 90% may be required to impose external cost on individuals * * *. The court in fact encourages experimentation with the covenant that each individual be given an equal voice in the distribution of public expenditures."

Thus, in each of these cases, the apportionment of seats in one or both houses of the legislature was declared to be violative of the Equal Protection clause on the ground that the apportionment on a population basis with respect to different political subdivisions of the state was unequal, and that a person's right to vote for State legislators was unconstitutionally impaired when its weight was unequal in comparison with votes of citizens living in other subdivisions of the state.

When the aforementioned cases refer to "debasement" of the right to vote they refer to a situation caused by legislative malapportionment. In the school bond election, the question of apportionment on any population basis did not exist, and there was no debasement or dilution of the vote in this sense. In that election each voter cast one vote and each was counted as such. Thus, there is a significant and obvious distinc-

tion between denial of equal protection with respect to malapportionment and the alleged denial in the instant case. The Nebraska legislators (elected under the one man, one vote concept) obviously felt that the issuance of bonds to extend over a long period to burden the taxpayers for educational purposes merited such import and consideration that more than a simple majority was required. This is a decision made by the duly elected representatives of the people of Nebraska on how to assess and use their bond revenues—not how to elect representatives.

In upholding the Constitutional and Statutory provisions of Idaho authorizing the issuance of general obligation bonds by subdivisions of government only on assent of two-thirds of the qualified electors voting at elections held for such purposes was not offensive to Equal Protection and one man, one vote, Justice Shepard, for the majority in *Bogert v. Kinzer*, 465 P. 2d 639, stated that:

> "What, then may we view as logical and coherent threads running through the above decision? Votes cast in the process of selecting representatives in government may not be debased to the end that one person's vote is worth more than another's because of geographic location. Persons may not be denied the right to vote for their representatives in government because of distinctions which are 'invidious'. Evidently, the determination of 'invidiousness' will be made on a case by case basis but includes at least factors of race, wealth, property ownership and military service. * * * We believe and hold that nowhere in the lines of cases is there even a hint that the constitutional and statutory provisions in the case at

bar, which allegedly 'debase' the vote of plaintiffs-respondents, are offensive to the requirement of the Equal Protection Clause * * *."

II. State Interest in Imposing a Sufficient Majority Requirement

It is true, that the "weighting" of votes as necessitated by the Nebraska Statute in this instance must not be "invidious or arbitrary" and must have a "rational basis", *Harper v. Virginia Board of Elections*, 383 U. S. 663, and be based upon a "compelling state interest", *Williams v. Rhodes*, 393 U. S. 23. However, these decisions do not preclude the states from ever weighting votes or distinguishing between electors. As the court stated in *Avery v. Midland County*, 88 S. Ct. 1114:

> "The equal protection clause does not, of course, require that the states never distinguish between citizens but only that the distinctions not be arbitrary or invidious * * *. The court is aware of the immense pressures facing units of local government and the greatly varying problems with which they must deal. The constitution does not require that a uniform straight jacket bind citizens in devising mechanisms of local government suitable for local needs and efficient solving of local problems."

In a similar vein, the court in *Williams v. Rhodes*, supra, stated:

> "In determining whether or not a state law violates the equal protection clause we must consider the facts and circumstances of the law, the interest in which the state claims to be protecting, and the interest of those who are disadvantaged by the classification."

In *McGowan v. The State of Maryland*, 81 S. Ct. 1101, the Supreme Court rejected the contention that the statutory arrangement which permitted only certain Anne Arundell County retailers to sell merchandise essential to, customarily sold at, or incidental to the operation of bathing beaches was contrary to the equal protection clause, because it discriminated against retailers in other Maryland counties. This discrimination in treatment was justified by the state interest in maintaining such a situation. The court said:

> "Although no precise formula has been developed, the court has held that the Fourteenth Amendment permits the state a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective * * *. A statutory discrimination will not be set aside if any state of facts reasonably may be construed to justify it."

In holding that the treatment of wage earners differently for municipal income tax purposes than those receiving profits from self-employment or business enterprises was not per se a prohibited discrimination, the Supreme Court in *Walters v. City of St. Louis*, (Missouri) 74 S. Ct. 505, stated:

> "* * * The power of the state to classify according to occupation for the purposes of taxation is broad. Equal protection does not require identity of treatment. It only requires that classification rest on real and not feigned differences, and that the distinction have some relevance to the purpose for which the classification is made, and that the dif-

> ferent treatment be not so disparate, relative to the difference in classification, as to be wholly arbitrary."

Thus, the fact that a particular state statute or constitutional provision discriminates or treats voters differently is not, of itself, a violation of Equal Protection so long as there is a legitimate, rational legislative objective being sought.

In a situation somewhat more analogous to the case at bar, the Fifth Circuit Court of Appeals in *Glisson v. Mayor and Councilmen of Town of Savannah Beach*, 346 F. 2d 135, affirmed the lower court decision upholding the right of the State of Georgia in granting municipal charters to make reasonable classification with respect to the right to vote in municipal elections. This court, citing *McGowan*, supra, in support, stated that:

> "It is apparent from the face of this legislation that there could be a logical and sensible reason for permitting non-residents owning property in the municipality to vote in the municipal election on an equal basis with resident persons, whether or not they are property owners. The nexus between the two is that each of them obviously has an interest in the operation of city government. Such a rational objective apparent it was, of course, correct for the district court to determine that the municipal charter did not offend the Fourteenth Amendment to the United States Constitution."

Using the same rationale as the Respondents in the case at bar, the effect of this Georgia provision is a "debasement" and "dilution" of and "discrimination" against the vote of the municipal residents who do not own prop-

erty. The important factor in this case, however, as in the case at bar, is that no voter was excluded from the electoral process, and the legislative interest was reasonable and compelling; providing non-resident property owners with a voice in municipal government out-weighed the distinction in the treatment of voters. We contend that the minimal "debasement" of the "yes" vote in the West Point bond election is far outweighed by rational and compelling reasons for the establishment of such a requirement.

It is important to point out at this point that the respondents divide voters neatly into categories of "pro-education" and "anti-education", that is, the electors voting against the improvements must be against all educational improvements. No evidence appears at trial level on this point, for there was only an abstract presentation of constitutional question by the pleadings, similar to what one would find in a high school political text book. The question is far more complex, and does not lend itself to such simplistic analysis and categorization. As shown by evidence in the *Hayes Smith v. West Point School District*, Case No. 5646, in the District Court of Cuming County, Nebraska, in Exhibit 5, the records of past West Point School Board meetings, there have been attempts by a minority of the members of the School Board to submit to the electors the question of issuing bonds in the amount of $700,000, rather than the proposed $1,645,000, which in the judgment of the minority was sufficient. Thus, the point in dispute amongst electors in the Nebraska case is one of degree rather than improvements or no improvements. Most disputes in

school bond elections are of this nature, for only illiterate persons would justifiably argue there is no need for improvement in education. It would be imprudent to spend the larger amount when a smaller amount would suffice, and there are strong indications in the *Smith v. West Point* case, supra, that the smaller amount would meet the educational demands of the area. A "gilded building program" is not always the answer to quality education and in the best interests of the taxpayers when a more prudent, economical course is available. In most school election proposals there is always an alternative plan. Once the long term debt is imposed it cannot be removed for the entire term. The mistake is a long term mistake. If an elected official proves to be a mistake, he can be removed in a short time; thus there is a political and practical difference between an officer election and a bond issue election.

However, the electors are given by the proposition submitted in this case only an opportunity to vote "yes" or "no". Yet respondents herein and their compratriot, West Virginia Education Association (a teacher's union) imply by their arguments at State Court level that those voting against the propositions are per se against education. There is no evidence to this effect in the record of this case. In the *Hayes Smith* case in Nebraska, there was specific evidence that he personally, when he was a member of the School Board, moved the adoption of a less costly building plan be submitted to the voters. Thus, it cannot be said or even implied that Hayes Smith or those who voted "no" on a specific program proposition anywhere are anti-education minded. No one can tell

from the record in the instant case whether there were alternative plans involved or not. We have to assume that all the "no" voters in West Virginia were not all illiterates. Since the mechanics of voting on a single proposition submitted to the electors does not lend itself to an accurate portrayal of what voters really want, then it does seem fair and reasonable to require more than a simple majority when submitting a proposition. This is particularly true when coupled with the practicality of life which is that as to a school improvement question one would expect the school board, teachers, teachers' organizations and school administrators will be at taxpayer's expense promoting the school improvement, which concept is discussed hereafter.

III. Voting Errors and Irregularities

The evidence in the Nebraska case shows, without contradiction, that election errors do occur in Nebraska and in the election of one official it ran as high as 2%. A casual reading of newspapers throughout the nation after an election and the cases in the lawbooks show election errors of various kinds occur throughout the United States. Even the voting machines do not correct the human errors in voting. Recognizing the frailties of humans, it would seem fair and reasonable that the Nebraska statute which provides for a margin of error of 4.99% by requiring more than a simple majority for the imposition of a general property tax of this type is not unreasonable as to the point of election errors. As stated in earlier paragraphs, this is not an election of representatives, mayor, or governor, but rather for or against

the direct imposition of a tax for a period of 20 to 30 years. There is no opportunity in this latter instance to "remove" the tax at a later date, as in the case of public officials, if the results of the election do not meet with the approval and expectations of the electors. In the West Point election, for example, those voting in favor of the bond issue represented only 33% of the eligible voters and evidence shows there were election irregularities.

It will be contended that more than a simple majority is not needed to correct errors in elections, since there is an adequate remedy at law to prosecute violators for irregularities and errors, etc. As a practical matter, however, in the case of an election regarding school improvements, this is an empty remedy, for it is seldom that taxpayers are going to take upon themselves the responsibility and expense of challenging an election because of errors, improper solicitation of votes or failure to comply with the mechanical steps in electoral procedures. Further, there is not the same motivation by the general taxpayers to challenge bond elections as there is by a nominee who lost by a small margin. He is motivated economically and by prestige to seek the remedy at law to challenge the election for errors and improprieties. There is no group or no voter so motivated in an election involving taxes. This, of itself, is sufficient compelling reason to require a reasonable additional number of votes in a direct imposition of tax by vote. A 2% error can happen as shown by the evidence in the Nebraska case. Thus, since this error can be two ways, it

is not unreasonable to require a 5% margin for imposition of taxes. When a special purpose election of this nature is involved regarding the imposition of a tax and not the election of representatives, it is the duty and the power of the legislature to take such contingencies into consideration. We believe that only an empty remedy at law exists for the taxpayer in his battle against undue taxation by direct vote. It is asking too much of citizen taxpayers to act as F. B. I. agents to ferret out election errors, mistakes, deliberate or unintentional violations of election laws, to determine whether in fact a simple majority properly voted for the tax. To say that there is an adequate remedy at law under such circumstances is an empty phrase, because it costs time, money and effort on the part of some individual citizen to challenge the governmental school establishment which is generally seeking to improve its own lot, including the buildings in which it works.

Voting irregularities, voting patterns of elections generally and the long term impact of this particular tax provides sufficient grounds and a rational criteria for legislative determination: manifestly a compelling state interest in demanding more than a simple majority. The equal protection clause does not preclude a state legislature from regulating the procedures and requirements of such matters of purely local concern.

IV. Promotion at Public Expense

In the *Hayes Smith* case there was without question the promotion of a particular school improvement pro-

gram, funded by public tax funds and the services of employees of the school district. The school children were urged by their teachers to encourage their parents and friends to vote for the school improvement program. Posters were placed at various points in town, and a comprehensive pamphlet was published and disseminated among the voters, all of which was financed through public funds. No such tax funds or school personnel were used, directed, or allowed to present the "no" side of the issue. Nebraska Education Association was active in promotion and we assume the West Virginia Education Association was also in the case, for their statistics appear attached as a pamphlet exhibit to the original companion complaint, Case No. 1063, regarding excess levies. See Original Record Transcript, Pages 70 to 98.

Active campaigning for public officials and public improvements, when done by private individuals with the use of private funds is an admirable aspect of our electoral process. Indeed, it is one of the few vestiges of "popular democracy" which still exists in our system of government. However, using public funds and the time and energies of public employees in a public capacity to promote one side of an issue can no more be condoned than permitting an incumbent Senator to campaign using public tax funds; particularly when the other candidate, or in this instance, the other side of the issue, is not given similar and equal access to such resources. There generally are no established counter agencies financed by public funds to promote the other side of the issue. There are all kinds of public agencies for poor and minority groups paid for by the taxpayers to challenge the unfair

governmental actions, but none for the taxpayer has developed in this country as a counter force. Once again, the only available remedy is for the taxpayers to get together individually, without the benefit of organizational aid other than their own, and at private, not public, expense.

It is a physical impossibility to keep the school boards, school management and teachers from speaking out or promoting one way or another in favor of bigger schools, and it may even be unwise politically to place strong limitations upon them in this regard. Recognizing such a factual human situation that cannot be effectively controlled by legislation, the only effective brakes upon the "school establishment" selling program is to require more than a simple majority, for if the building program is so good for the community and so absolutely needed, a substantial number of voters should be so convinced and the "school establishment" with its built-in advantages for selling should be able to sell it. Otherwise, with a one-sided sales promotion on only one choice, the school establishment can easily with a simple majority keep selling a school district into over spending and bankruptcy. To prevent this one-sided approach to the bigger schools, there is a compelling interest in the fiscal soundness of the district to require more than a simple majority on long-term tax impositions, and certainly a 4.99% majority is not of substantial nature.

We have imbedded in our whole legal and political systems the concept of having more than a simple majority vote when dealing particularly with principles. In

the civil jury trial, Nebraska requires 10/12ths. Nationally, 2/3rds votes of Senators are required by the Constitution. There are many others. These more than a majority requirements are built into our democratic process partially to protect against the excesses of the simple majority, but also as a recognition of human frailties that become involved in any electoral process or decision process, so that when a long range decision is rendered, there are a substantial number of people who concur in the decision.

V. Political Question

If the Nebraska provision is declared invalid, so also in principle and in logic are the provisions of the Nebraska Constitution which requires a two-thirds or three-fifths vote to accomplish the intended result. For if the duly elected representatives of the people of Nebraska are not constitutionally permitted to enact a statute requiring more than a majority in some instances, then neither can the people establish a constitution which requires more than a majority in some political decisions. At least at nine different places in the Nebraska Constitution are there requirements of more than a simple majority to have a political action.[1] It is reasonably safe

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1. Article III, Section 10; with regard to expulsion of members of the legislature, "* * * No member shall be expelled except by a vote of 2/3 of all the members * * *."

   Article III, Section 22; Appropriations. "Each legislature shall make appropriations for the expenses of the government until the expiration of the next regular session * * * and whenever it is deemed necessary to make further appropriations for deficiencies, the same shall require a 2/3 vote of all members elected * * *."

(Continued on following page)

to say that other state constitutions have similar restrictions on the majoritarian concept.

(Continued from previous page)

Article III, Section 27; Acts take effect after three months; emergency bills; session laws. "No act shall take effect until three calendar months after the adjournment of the session at which it passed, unless in the case of emergency * * * the Legislature shall, by a vote of two-thirds of all the members elected to each House otherwise direct."

Article IV, Section 15; Bills and resolutions to be presented to Governor; approach; procedure; disapproval or items of appropriations. "Every bill passed by the Legislature, before it becomes law, and every order * * * shall be presented to the governor * * * but if he does not approve, he shall return it with objections to the House * * * . If then three-fifths of the members elected agree to pass the same, it shall be sent together with the objections to the other house, by which it shall likewise be considered; and if approved by three-fifths of the members elected to that house, it shall become law, notwithstanding the objections of the governor.**"

Article V, Section 2; Supreme Court. "No legislative act shall be held unconstitutional except by the concurrence of five (of the seven) judges."

Article XII, Section 5; Elections for directors or managers. "Voting rights of stockholders** in all elections for directors and managers of incorporated companies, every stockholder shall have the right to vote in person or proxy for the number of shares owned by him."

Article XIII, Section 2; Donation to Rail Roads; how made. "No city, town precinct** shall ever make donations to any railroad, or other works of internal improvement, unless a proposition so to do shall have first been submitted to the qualified electors thereof**. Provided, further, that any city or county may by a two-thirds vote, increase such indebtedness**."

Article XVI, Amendments; Section 1; How proposed. "The legislature may propose amendments to this constitution, if the same be agreed to by three-fifths of the members elected to the Legislature."

Article XVI, Amendments; Section 2; "When three-fifths of the members of the legislature deem it necessary to call a convention to revise, amend, or change this constitution**."

The possible conflict here between the Nebraska Statute in question and the Equal Protection Clause of the Fourteenth Amendment is also negated by the existence of numerous similar provisions in the Constitution of the United States by which a two-thirds vote or three-quarters vote is required for political actions. The United States Constitution has at least four provisions requiring more than a majority for certain political actions.[2]

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2. Article I, Section 3, relating to impeachments, states in part, that "And no person shall be convicted without the concurrence of two-thirds of the members present."

   Article I, Section 7, relating to the passage of bills and resolutions, states in part, that "If after such reconsideration two-thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and if approved by two-thirds of the House, it shall become a law"; and "Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary** shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives according to the rules and limitations prescribed in the Case of a Bill."

   Article II, Section 2, relating to the powers of the President, states in part, that "he shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur."

   Article V, relating to Amendments to the Constitution, states in part that "The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the application of the Legislatures of two-thirds of the several states, shall call a convention for proposing Amendments, which, in either case, shall be valid to all intents and purposes, as part of the Constitution when ratified by the Legislatures of three-fourths of the several states or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress."

These provisions in the Federal Constitution also evidence an intent among the Founding Fathers not to require a simple majority in every decision making process and the realization that in many instances when a substantial burden or significant change is contemplated, a majority plus requirement is often the wisest course.

Haymond, President, in dissenting from the majority in the case of *Lance v. The Board of Education of County of Roane*, supra, expressed this same concept.[3] Thus it appears that to hold the Nebraska statute or other statutes requiring more than a simple majority invalid would place the constitutionality of a significant portion of the Nebraska and other state constitutions in doubt. This raises the serious question as to how far the judiciary is going to extend the one man, one vote concept as first enumerated in *Baker v. Carr*, supra. The apportionment cases initiated an entrance by the courts into an area previously thought inherently "Political" and thus outside their jurisdiction under the doctrine of separation of powers. The issue now is whether the Equal Protection Clause will be used not only to guarantee "one man, one vote" in the election of public offi-

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3. Lance v. Board of Education of County of Roane, 170 S. E. 783, page 798. "There is no conflict or inconsistency between the above quoted constitutional provisions and the Equal Protection Clause of the Fourteenth Amendment and all such provisions are, of course, valid and effective. **no court has ever indicated that there is any such conflict or inconsistency and it necessarily follows that there is no inconsistency between the Equal Protection Clause and the two constitutional provisions here involved and the other provisions of the Constitution of this state which are similar to the quoted provisions of the Constitution of the United States, all of which require more than a majority vote**."

cials, and in the apportionment of legislative districts, but to force the states to base all elective decisions on a bare majority to prevent the "debasement" of individual votes no matter how rational or imposing the reasons may be for making decisions on the basis of other criteria. The court in the *Bogert v. Kinzer case*, supra, in considering this point stated:

> "However, it is a far different thing for this court or any court to insert its judgment into the area of pure political theory. We do not believe that the theory of 'one man, one vote' as discovered in the Equal Protection Clause, militates against and prohibits the continuation of a political theory which lies at the foundation of our government, which, simply stated, is a consensus amounting to more than a simple majority is not only desirable, but necessary at certain times and under certain circumstances * * *."

Once the special purpose election is recognized for what it is, the product of legislative give-and-take, the compromising among policies that often conflict, and the consideration of local facts, peculiarities and objectives, it becomes evident that the process is inherently political in nature and outside the jurisdiction of the judicial branch of the government. There is also a right not to vote involved. Since this affects the majority expression of all registered voters, the legislatures, knowing that in America there is not a high percentage of voters, can require more than a majority of those voting to get a true consensus of the electors.

The court in *Luther v. Borden*, 7 How. 1, 12 L. Ed. 581, pointed out the dangerous consequences of such poli-

tical type activities by the courts, in considering whether or not to invalidate a chartered state government:

> "* * * For, if this court is authorized to enter upon this inquiry as proposed by the plaintiff, and it should be decided that the charter government had no legal existence during the period of time above mentioned, if it had been annulled by the adoption of the opposing government, then the laws passed by its legislature during that time were nullities; its taxes wrongfully collected; its salaries and compensations to its officers illegally paid; its public accounts improperly settled; and the judgments and sentences of its courts in civil and criminal cases null and void * * *. When the decision of this court might lead to such results, it becomes its duty to examine very carefully its own powers before it undertakes to exercise jurisdiction."

In the case of *Baker v. Carr*, supra, after reviewing the decisions in the area of what is or is not a "political question", the court concluded that on the surface of any case held to involve a political question was at least one of the following formulations:

> "a textually demonstrable constitutional commitment of the issue to a co-ordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the possibility of a court's undertaking independent resolution with expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to the political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

The case at bar falls within this definition of a "Political question". A determination of the procedures and manners by which local education will be funded can only be managed adequately and effectively by local policy making bodies. The "wisdom" of such legislation cannot and should not be determined by the courts.

With respect to state tax statutes and regulatory measures, for example, it has been said that the "day is gone when this court uses the * * * Fourteenth Amendment to strike down state laws * * * because they may be unwise, improvident, or out of harmony with a particular school of thought", *Williamson v. Lee Optical Co.*, 348 U. S. 483. It is all the more compelling to follow this principle of self-restraint when what is involved is the freedom of a state to deal with so intimate a concern as the maintenance, improvements, and funding of its educational system. Judicial interference in matters of this sort cannot but encourage popular inertia in efforts for political reform through the political process, with the inevitable result that the process itself is weakened. This would be a disservice to the broader values of our system of government.

VI. Presumption of Constitutionality and Adequate Hearing

We submit there has been an inadequate trial of the issues at trial level in this cause to justify decision by this court on issues reaching into every governmental or organizational system in the United States in the face of the rule of strong presumption of constitutionality. Factual reasons for the constitutional or statutory re-

quirements are not in evidence. At trial level there is an answer by the Board of Education of the County of Roane with some general constitutional-political affirmations represented by about two pages of Transcript, pages 64 and 65 in the Original Record *with no exhibits*, while plaintiff's (respondent, Granville H. Lance) initial complaint in the Original Record at pages T3 to 14, is a document of 11 pages with numerous exhibits reaching to page 56 in the Original Transcript Record, apparently prepared by the West Virginia Education Association, a counter-part of the Nebraska Education Association. The latter has actively taken over the defense of the *Smith* case in Nebraska. Perhaps Roane County didn't believe in a full portrayal of factual reasons for the anti-majoritarian legislation. We find none of the practical political reasons referred to above shown in the defense of the 60% requirement, and merely generalized phrases of political concepts (see App. pp. 19a, 20a and part of 21a). Plaintiff's complaint *without exhibits* covers 13 printed pages, 4a to 17a of the Appendix, interlaced with political type complaints of the West Virginia constitutional processes that are so time-consuming that only the courts can handle and make "* * * the improvements necessary to meet the educational requirements of Roane County * * *," Appendix, 15a. This case represents two original cases consolidated, with one of the exhibits, being a pamphlet study by the West Virginia Education Association. Perhaps there are no voting irregularities or errors in West Virginia and the "school establishment" in West Virginia never attempts to promote a bond issue and its voters will never vote for any

kind of school improvement plan or any alternative plan. From reading the record in this case, it is clear we will never know anything about these facts of this political constitutional question. It may be that historically the property owners got the 60% requirement on the books in West Virginia, but if they have any one man, one vote concept in West Virginia supporting their elected representatives, we submit that that is the body to change the law and not have the Supreme Court do it.

It is significant that the record contains no evidence showing the 60% requirement as being reasonable or unreasonable infringement upon the voters' rights. The record shows at most that the West Virginia Education Association has lost a number of local improvement questions under the 60% requirement. No evidence shows that any alternative plans were also denied by the voters. In the bond question involved in this case 48.45% said they did like the improvement plan submitted. This is quite a substantial group. They didn't say they wanted no improvements at all. Electors through their constitutions or elected representatives can impose some self-restraints on their own local governmental functionaries for this is the essence of constitutional government. Also, various restraints upon electors are imposed for the good of all by representatives of those electors elected on a one man, one vote basis. The Federal Constitution does not envision a popular direct vote on every issue to regulate ourselves. It envisions laws enacted based on representative voting. The voting for those individuals has to be decided by the simple majority, if for no other reason than to get a decision as to who that

representative is; otherwise, this decision would have to be by combat as it was historically. We think it strange for certain "enlightened" West Virginians to make an official complaint to United States courts that their own constitutional state governmental machinery is so cumbersome or time consuming that they, the enlightened ones of West Virginia, must ask that the Supreme Court strike it down, and further alluded that their own "unenlightened" do not want to improve their educational lot. This is the thrust of their case. We submit that such a matter is purely of local concern, and that so long as the restraints are not so onerous as to severally shackle the governmental obligation to educate and the compelling state interest is related to fiscal policies, not election of officials. that the Supreme Court should not be concerned with the internal problems of West Virginia. The cardinal rule for the construction of a statute or a state constitution is to uphold its constitutionality, *U. S. v. Harris*, 74 S. Ct. 808. Every statute is presumed to be constitutional, *Bute v. People of State of Illinois*, 68 S. Ct. 763, and this presumption obtains, unless invalidity is clearly shown beyond reasonable or substantial doubt, *Gorin v. U. S.*, CCA Cal., 111 Fed. 2d 712, affirmed 60 S. Ct. 429. Plaintiff must overcome by facts judicially known or proved any state of facts which can be reasonably conceived to sustain it. *City and County of San Francisco v. Market Street Railway Co.*, CCA Cal., 98 Fed. 2d 628, certiorari denied, 59 S. Ct. 357. This presumption of validity is strong, *Shattack v. Gallagher*, CCA Ohio, 218 Fed. 2d 428. No evidence shows that plaintiffs in this case were denied right to vote or

the opportunity to change the laws or the constitution of West Virginia. There is found in pleadings only a failure to convince enough electors under West Virginia laws as to need for certain educational expenses. This internal state problem should be decided by the electors of West Virginia by changing their constitution or laws, and not have this Supreme Court do it. Certainly, if there is to be a judicial hearing as to an issue affecting the whole United States, there should be a full scale presentation of facts and political evidence with opportunity for all the states to present their reasons for their individual level of self-imposed restraints on the direct decision powers of voters. This case in our judgment should at a minimum be sent back for retrial, if the Supreme Court is going to give serious consideration to imposition of the simple majoritarian principle upon all governmental decisions in these United States.

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CONCLUSION

The issue here relates not to a method of apportionment nor a denial of the right to change the laws of West Virginia by vote, but solely to the right of a state to set whatever standards it deems desirable for the funding of local educational systems. There is a "weighing" of votes in the case at bar, but under the circumstances, it is not significant enough to be termed unreasonable, and

the state interests involved are sufficiently "compelling" and "rational" to justify requiring more than a simple majority.

There is no area more inherently and necessarily political in nature than the funding of local education. Circumstances of procedures and the necessities of these types of problems can only be determined by the state. None of the electors in West Virginia or Nebraska were excluded from the electoral process. Members of the Nebraska Legislature were elected on a one man, one vote basis and we assume for these purposes that the West Virginia Legislature was so elected, and to date the guarantee of a "republic form of government" and "Equal Protection Under the Laws" has been construed to guarantee that elected representatives shall be so elected. This concept has not, and should not be used as a basis for dictating that all decisions made by state legislators, or the electors themselves, should be made on a basis of a simple majority.

We submit that the decision by the West Virginia Supreme Court of Appeals be reversed and that judgment by the Circuit Court of Roane County be sustained, and the petitions dismissed, or in the alternative that the case be remanded to the Circuit Court of Roane County, West Virginia, for further proceedings, based upon a full trial of all issues and facts supporting the compelling

state interest in retaining the 60% constitutional and statutory requirement for imposition of taxes.

Respectfully submitted,

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August, 1970

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IN THE

Supreme Court of the United States

October Term, 1970

No. 96

A. T. GORDON, *et al.*,
Petitioners,

v.

GRANVILLE H. LANGE, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRIEF OF *AMICUS CURIAE* SEATTLE SCHOOL DISTRICT NO. 1

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September 11, 1970

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BRIEF OF *AMICUS CURIAE*
SEATTLE SCHOOL DISTRICT NO. 1

SUMMARY OF ARGUMENT

The 60% majority vote requirement gives to the vote of each person who votes against property tax levies and bond issues 50% more weight than is given to the vote of each person who votes for such propositions. Three "For" votes are required to "equal" two "Against" votes.

When a state uses a public election to determine an issue, the right of any qualified voter to vote in such election cannot be diluted by any classification or weighting scheme, whether direct or indirect, unless such classifica-

tion or weighting is *necessary* to promote a *compelling* state interest.

Weighted voting is not necessary to secure municipal solvency nor to hold down property taxes. Weighted voting is not the only nor even the best method of achieving these purposes. In fact, weighted voting has not been generally effective to limit local indebtedness or to achieve low property tax levels. Thus, weighted voting is a state classification which cannot be justified under the applicable constitutional test.

There is no logical distinction between the dilution and denial of the vote. Both dilution and denial are equally discriminatory. Each person is entitled to one vote whenever the state invokes the electoral process whether for the purpose of electing legislative representatives or school board members or deciding local bond issues or excess levies. This does not mean one-half vote for some; it means one-man-one-vote.

The weighted voting provisions before this court discriminate between voters on the basis of *how* they may vote by diluting the votes of those who would vote in favor of property tax levies and bond issues. These provisions constitute an invalid discrimination under the equal protection clause.

INTEREST OF *AMICUS CURIAE*

Seattle School District No. 1 is a political subdivision of the State of Washington. This brief is submitted on behalf of the Seattle School District by its authorized law officer, Mr. James R. Ellis, under the provisions of Rule 42(4), Rules of the Supreme Court of the United States.

The Washington Constitution and related statutes contain weighted voting provisions for certain tax levy and bond issue elections similar to those in West Virginia. Local property tax levies and bond issues in Washington which exceed specified limits must, as in West Virginia, be approved by a 60% majority at an election held for such purpose.[1]

The Seattle School Board will be directly and significantly affected by the decision of the Supreme Court in the instant case, *Gordon v. Lance*. In each of the past 13 years, the Seattle School District has been required to secure 60% approval by the voters of property tax levy propositions to provide operating funds.

On November 4, 1969, the District Board of Directors submitted to the voters a proposition to authorize an excess levy of $40,320,000 for regular school operating and maintenance expenses on all taxable property in the district for collection in 1971. The proposition was approved by 56.5% of the voters. Since the measure did not receive 60% affirmative approval, the excess tax levy was certified by the election officials as having failed.

A Seattle resident filed a suit in United States District Court for the Western District of Washington, Northern Division, alleging that the provisions of the Washington Constitution and related statutes requiring a 60% affirmative vote for excess levies and bond issues violated the equal protection clause of the United States Constitu-

1. The Seventeenth Amendment to the Washington State Constitution provides that property tax levies in excess of a 40-mill limitation may be exceeded only when three-fifths of the electors authorize an excess levy. Article VIII, Section 6, as amended by the Twenty-Seventh Amendment, provides that local taxing districts may not incur indebtedness in excess of specified limitations unless authorized to do so at an election in which ⅜ of the voters vote in the affirmative.

tion.[2] The Seattle School District was a named party to the action and supported the position of the plaintiff therein. The District Court stayed all proceedings until the United States Supreme Court decides *Gordon v. Lance.*

POSITION OF SEATTLE SCHOOL DISTRICT NO. 1

Amicus Seattle School District No. 1 supports the position of respondent *Lance* that the relevant weighted voting provisions of the West Virginia Constitution and related statutes violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Similar restrictions contained in other state constitutions and statutes are equally void.

It is the position of *Amicus* Seattle School District that the weighted counting of votes based upon the way a person votes abridges the fundamental right of every voter to have his vote counted equally in any public election in which he participates.

There are two primary questions before this court:

(1) What Constitutional test should be applied to determine whether state classifications affecting voting rights comply with the mandate of the Equal Protection Clause?

(2) Do the relevant weighted voting provisions of the West Virginia Constitution comply with the appropriate Constitutional test?

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2. *Nelson v. Evans et al,* United States District Court, Western District of Washington, Northern Division, No. 8633.

STATE CLASSIFICATIONS AFFECTING VOTING RIGHTS MUST BE NECESSARY TO PROMOTE A COMPELLING GOVERNMENTAL INTEREST

The Supreme Court has adopted two different standards to determine whether classifications under state law comply with the Equal Protection Clause. The court has applied the "traditional" or "minimum" standard of rational relation to permissible goal when determining the validity of state classifications which do not abridge fundamental rights. Thus, legislative classifications dealing with economic or business regulation will be upheld if they bear some rational relationship to a legitimate state purpose. *McGowan v. Maryland,* 366 U.S. 420, 6 L.ed.2d 393, 81 S. Ct. 1101 (1961). However, for many years, the court has applied a different and stricter standard to measure the equal protection compliance of state classifications which affect fundamental rights and the court has given strict scrutiny to such classifications.

Where a state legislative classification "involves one of the basic civil rights of man," the court will require "strict scrutiny of the classification." *Skinner v. Oklahoma,* 316 U.S. 535, 541, 86 L.ed. 1655, 62 S. Ct. 1110, 1113 (1942). State classifications affecting fundamental rights will be upheld only upon a showing that the classification is "necessary to promote a compelling governmental interest." *Shapiro v. Thompson,* 394 U.S. 618, 634, 22 L.ed.2d 600, 89 S. Ct. 1322 (1969). The classification is not "necessary" if an alternative means of achieving the governmental purpose is available which does not infringe upon a person's fundamental rights. *Shapiro v. Thompson,* 394 U.S. 618, 22 L.ed.2d 600, 89 S. Ct. 1322 (1969).

The right to exercise the franchise is a fundamental right. *Reynolds v. Sims*, 377 U.S. 533, 12 L.ed.2d 506, 84 S. Ct. 1362 (1964). The general presumptions of constitutionality do not pertain in voting rights cases. *Kramer v. Union Free School District*, 395 U.S. 621, 23 L.ed.2d 583, 89 S. Ct. 1886 (1969). The Supreme Court has consistently applied the strict standard of equal protection compliance to cases involving voting rights.

In *Kramer v. Union Free School District*, 395 U.S. 621, 23 L.ed.2d 583, 89 S. Ct. 1886 (1969), the court applied this strict equal protection standard to voting classifications in clear and unmistakable terms:

> "Thus, state apportionment statutes, which may *dilute* the effectiveness of some citizens' votes, receive close scrutiny from this Court. *Reynolds v. Sims, supra.* See *Avery v. Midland County*, 390 U.S. 474, 20 L.Ed.2d 45, 88 S. Ct. 1114 (1968). No less rigid an examination is applicable to statutes *denying* the franchise to citizens who are otherwise qualified by residence and age. Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives. Therefore, if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest. See *Carrington v. Rash, supra*, 380 U.S. at 96." 395 U.S. at 626.

The United States Supreme Court has never applied the rational relation test to *uphold* a state classification which either dilutes or denies the right of any person, who is qualified by age, residence, citizenship or literacy, to cast his vote at a public election and have it counted equally with all other persons who vote in that election.

The rule established by the Supreme Court is clear. Classifications restricting voting rights are subjected to a test with two essential elements. First, the state must establish that the classification promotes a governmental interest which is "compelling." Second, the state must demonstrate that the classification is "necessary" to promote this purpose. If any alternative method less restrictive of fundamental rights is available to achieve the governmental purpose, the classification will not be deemed to be "necessary."

Unless the weighting of votes is "necessary" to promote a "compelling" interest of the State of West Virginia, the relevant provisions of the West Virginia Constitution must be held invalid under the Equal Protection Clause of the Fourteenth Amendment.

WEIGHTED VOTING IS NOT NECESSARY TO PROMOTE A COMPELLING STATE INTEREST

Advocates of weighted voting generally advance two state purposes to justify extraordinary majority requirements for tax and bond elections: (1) such requirements are needed to hold down taxes upon property, and (2) such requirements are needed to preserve municipal solvency and fiscal integrity.

1. The Protection of Property Owners As a Class Is Not a Compelling Government Interest

A primary reason for the presence of weighted voting provisions in state constitutions and related statutes was the desire to limit property taxes for the purpose of pro-

tecting property owners as an economic class.[3] While this may be a valid governmental purpose it is clearly not the "compelling" governmental interest required to justify diluting the votes of qualified voters.

A state may, of course, limit property taxes or protect a particular economic group so long as it does not misuse the franchise in the process. However, once the state has invoked the franchise for such purpose, it cannot validly limit the right to vote to persons who own property. *Cipriano v. City of Houma*, 395 U.S. 701, 23 L.ed.2d 647, 89 S. Ct. 1897 (1969); *City of Phoenix, Arizona v. Kolodziejski*, 90 S. Ct. 1990 (1970).

Most constitutional and statutory weighted voting provisions do not expressly state that the right to vote is diluted or weighted to protect an economic group. The method of weighting votes by requiring a super majority has *direct* application on *how* a person votes rather than *who* he is or what he owns. It does not, however, take much imagination to pierce the political veil and see that those persons who oppose local property tax issues will effectively reflect the economic interests of property owners as a class. Weighted voting is thus designed to use public elections to accomplish indirectly the same result that could not be validly accomplished by directly restricting the right to vote to the owners of property.

The fact that a classification by weighted voting is more

3. The official Voter's Pamphlet published in 1938 by the State of Washington in connection with the 40-mill tax limit initiative election of that year states in argument for this measure:

"Initiative 129 safeguards the *taxpayer* in the voting of special levies by requiring their approval by a substantial majority." (Emphasis added) State of Washington, Voter's Pamphlet (1938) at p. 8.

subtle and indirect than a classification by denial of the vote does not make it less discriminatory. If the framers of weighted voting provisions had given half a vote to those who do not own property, the electoral discrimination would have been more obvious but no more effective. The weighted vote provisions are not saved from the mandate of the equal protection clause by the subtlety that they merely dilute the votes of persons who will vote in favor of the taxation of property.

2. The Government Interest of the State in Limiting Property Taxes Is Not Achieved by Weighted Voting

Even if limiting property taxes has a valid governmental purpose separate from the protection of property owners, it certainly cannot be maintained that the use of weighted voting is necessary to achieve such purpose. It is neither the best nor the only nor the least restrictive means of reducing property taxation. In fact, weighted voting has not generally limited property taxes and now bears little, if any, rational relation to the general limitation of property taxation.

First, there is no evidence that a simple majority vote approval for excess property tax levies would necessarily result in a general increase in property tax levels. Commenting on this issue, the California Supreme Court in *Westbrook v. Mihaly*, 87 Cal. Rptr. 839, 471 P.2d 487 (1970) stated:

> "Second, the information available to us does not warrant a characterization of property owners as a beleaguered minority which would be forced to shoulder the total cost of bond-financed projects. There are indications that a substantial majority of the registered

voters in California own their own homes. In addition, it is important to recognize that those who do not own real property nevertheless pay property taxes indirectly. Rental payments of lessees of taxable real property are to a material extent a function of the property tax. Those few who neither own nor rent taxable property must still purchase goods and services from commercial enterprises that do and which, to some extent at least, incorporate that tax in the prices charged consumers.

"Thus, the factual predicates of respondents' contention do not exist. The probability of a property-owning minority being subjected to confiscatory taxation by the unbridled appetites of the property less masses is no more than 'theoretically imaginable.' (*United Mine Workers v. Illinois State Bar Assn.* (1967) 389 U.S. 217, 224, 19 L.ed.2d 426, 88 S. Ct. 353) No such remote dangers can justify the 'immediate and crippling impact' (*Williams v. Rhodes, supra,* 393 U.S. 23, 33, 89 S. Ct. 5) on the rights of all citizens (property owners or not) who favor certain proposed governmental action, to receive equal protection of the law." 471 P.2d at 508.

A review of property tax levels in each of the 50 states further indicates that there is, in fact, no general positive correlation between presence of weighted voting provisions and low property taxes.

COMPARISON OF PROPERTY TAX BURDEN[4] BETWEEN STATES WITH WEIGHTED VOTING AND STATES WHICH DO NOT WEIGHT VOTING

	Property Taxes in Dollars per $1,000 of Personal Income
Average Property Tax Levels of States with Weighted Vote Provisions (20 states)	46.72
Average Property Tax Levels of States without Weighted Vote Provisions (30 states)	39.82
United States Average	44.39
United States Median	44.65

In view of these facts, it certainly cannot be maintained that weighted voting generally results in lower property tax levels or that there is any rational relationship between weighted voting and low property tax burdens. Ironically, in the case of the Seattle School District, the net effect of weighted voting has been to increase costs resulting from the holding of resubmission elections.[5]

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4. This summary comparison of property tax burden between states with weighted voting and states which do not weight voting was derived from the information and sources set forth in Appendix A.

5. A review of recent school district excess levy elections in the Seattle metropolitan area reveals that weighted voting has not, in fact, generally limited property tax levels. The net effect of weighted voting in many cases simply has been the holding of resubmission elections. In the Seattle School District, five out of the last six annual levies were resubmitted for the sole purpose of raising a simple majority to a 60% majority. (One levy received more than 60% at the first submission.) All of the resubmittal levies were ultimately passed without change so the net effect of the weighted vote requirement was to increase total school costs by the average cost of each resubmission election ($65,000.00). Source: Superintendent, Seattle Public Schools. In King and Pierce Counties, 24 levies were resubmitted in 1968-69 for the sole purpose of raising a simple majority to a 60% majority. All passed on resubmission. Each school district paid for two elections. SOURCE: Superintendent of Schools, King County and Pierce County.

In the long run the most effective and perhaps the only effective means of limiting property taxes is to provide alternative sources of revenue to meet essential governmental purposes. For the hard truth is that essential services will ultimately be met: children must be educated, sewers must be built, transportation must be provided. If property taxes are to be limited or reduced, government expenditures must be reduced or other sources of revenue must bear a proportionate higher burden. There are a wide range of different subjects of taxation available: sales tax, use tax, motor vehicle excise tax, admissions tax, cigarette tax, liquor tax, conveyance tax, business and occupation taxes, and corporate and personal income taxes.

3. The Government Interest of the State in Promoting Local Fiscal Responsibility Is Not Achieved by Weighted Voting

The preservation of municipal fiscal integrity may be a valid, even compelling, state purpose. The crucial question then remains whether weighted voting provisions are necessary to achieve this purpose.

An analysis of the history and current effect of weighted voting restrictions on the incurring of municipal debt demonstrates that weighted voting does not in fact generally tend to limit the total amount of local government indebtedness, let alone promote local government fiscal integrity.

The effect of extraordinary majority vote requirements has not been to limit total debt but simply to change the *form* of debt to avoid constitutional voting requirements. Local debt then takes the form of a variety of revenue and assessment bonds and various forms of lease-purchase financing. California is a typical example of the effect of

weighted voting on local indebtedness. The California Constitution provides that general obligation bond proposals of certain local governments must be approved by a ⅔ majority of the voters in a popular referendum. In *Westbrook v. Mihaly*, 87 Cal. Rptr. 839, 471 P.2d 487 (1970) the California Supreme Court, in reviewing the history and effect of weighted voting, stated:

> "Finally, there is impressive evidence that the two-thirds requirement has not so much limited total local government indebtedness as it has redirected borrowing into vehicles other than the general obligation bonds of regularly constituted political units. While the economic consequences of these alternate financing devices are substantially similar to those of voted general obligation bonds, they are not required to receive a two-thirds majority vote and, in some instances, permit long-term borrowing over which the public has no direct control at all.
>
> "This phenomenon has attracted the widespread, often critical, attention of legal and financial commentators. Their consensus, which we accept, is that the diversion of local borrowing into novel, more costly financing methods which often entirely evade submission to elections, renders any claim that the two-thirds vote requirement insures sound fiscal policy and popular control of long-term borrowing highly dubious at best." 471 P.2d at 505.

The California court further found that there is no evidence that weighted voting promotes greater fiscal solvency than may be achieved by majority voting:

> "Nor is there any evidence that California's two-thirds requirement (which is among the most restrictive in the nation), has produced greater fiscal security than may be achieved with a simple majority vote requirement. Although most states do not require a two-thirds vote, we have been referred to no data indicating more frequent bond defaults, lower credit

> ratings, or extravagant public projects in those states. As we have previously noted, since 1849, the State of California has been permitted to borrow in excess of its debt limit with the approval of 50 percent of those voting on a particular bond issue. (Cal. Const., art. XVI, Sec. 1.) Yet, State of California general obligation bonds are rated as high-grade bonds by the major investment advisory services. The judgment of the market place does not support respondents' argument. Indeed, the credit rating of a community may well be eventually impaired if, as a result of inability to secure a two-thirds consensus, necessary projects are deferred and the quality of life deteriorates." 471 P.2d at 505.

In short, weighted voting is not the only nor the best method of achieving municipal solvency or low property taxes. In fact, it has not generally accomplished either purpose. Certainly, weighted voting cannot be said to be "necessary" to achieve either purpose.

WEIGHTED VOTING DOES NOT ESCAPE THE SWEEP OF THE VOTING RIGHTS CASES

1. Broad Principles Set Forth in Voting Rights Cases Are Applicable to Weighted Voting

It is conceded that the instant case is one of first impression before the United States Supreme Court, but we submit that broad principles *have* been laid down by the court in the voting rights cases under which there is no logical escape from the conclusion that the instant weighted voting provisions do in fact dilute and debase the votes of individual voters in violation of the equal protection clause.

Each decision arises out of its own facts. So we have decisions involving vote dilution in legislative apportionment, *Wesberry v. Sanders*, 376 U.S. 1, 11 L.ed.2d 481, 84 S. Ct. 526 (1963); *Reynolds v. Sims*, 377 U.S. 533, 12

L.ed.2d 506, 84 S. Ct. 1362 (1964); vote denial on account of race, *Gomillion v. Lightfoot*, 364 U.S. 339, 5 L.ed.2d 110, 81 S. Ct. 125 (1960); vote denial for those who do not own property, *Kramer v. Union Free School District*, 395 U.S. 621, 23 L.ed.2d 583, 89 S. Ct. 1886 (1969); *City of Phoenix, Arizona v. Kolodziejski*, 90 S. Ct. 1990 (1970); or those who cannot afford to pay $1.50 to vote, *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 16 L.ed.2d 169, 86 S. Ct. 1079 (1966); or those in the armed services, *Carrington v. Rash*, 380 U.S. 89, 13 L.ed.2d 675, 85 S. Ct. 775 (1965); or vote dilution by the weighted counting of votes in regular elections for state officers of any kind, *Gray v. Sanders*, 372 U.S. 368, 9 L.ed.2d 821, 83 S.Ct. 801 (1963).

The fundamental basis of each of these holdings is increasingly clear. Each case has steadily strengthened the integrity of the electoral process and the right of the individual to cast his vote and have it counted equally. The weighted voting provisions contained in numerous state constitutions and statutes sit squarely astride the path of these holdings. As advocates of weighted voting analyze each Supreme Court decision on voting rights, they find themselves more closely confined in the narrow foxhole of their distinctions.

Times and conditions change. In *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 16 L.ed.2d 169, 86 S. Ct. 1079 (1966), Mr. Justice Douglas describes the court's evolutionary view of fundamental rights dramatically:

> "Likewise, the Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic

notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. See *Malloy v. Hogan*, 378 U.S. 1, 5-6, 84 S. Ct. 1489, 12 L.Ed.2d 653. Notions of what constitutes equal treatment for purposes of the Equal Protection clause *do* change. This Court in 1896 held that laws providing for separate public facilities for white and negro citizens did not deprive the latter of the equal protection and treatment that the Fourteenth Amendment commands. *Plessy v. Ferguson*, 163 U.S. 537, 16 S. Ct. 1138, 41 L.Ed. 256. Seven of the eight Justices then sitting subscribed to the Court's opinion, thus joining in expressions of what constituted unequal and discriminatory treatment that sound strange to a contemporary ear. When, in 1954—more than a half-century later—we repudiated the 'separate-but-equal' doctrine of *Plessy* as respects public education we stated: 'In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written.' *Brown v. Board of Education*, 347 U.S. 483, 492, 74 S. Ct. 686, 691, 98 L.Ed. 873. . . .

"We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined. See, e.g., *Skinner v. State of Oklahoma*, 316 U.S. 535, 541, 62 S. Ct. 1110, 1113, *Reynolds v. Sims*, 377 U.S. 533, 561-562, 84 S. Ct. 1362, 1381; *Carrington v. Rash, supra; Baxtrom v. Harold*, 383 U.S. 107, 86 S. Ct. 760, 15 L.Ed.2d 620; *Cox v. State of Louisiana*, 379 U.S. 536, 580-581, 85 S. Ct. 453, 469, 13 L.Ed.2d 471 (Black J., concurring).

"Those principles apply here. For to repeat, wealth or fee paying has, in our view, no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned." 383 U.S. at 669, 670.

2. Voting Rights Cases Are Not Limited to Discriminations Arising Out of Legislative Apportionment or Geographic Location

It may be argued that the apportionment cases are not applicable to the instant situation because the dilution or weighting of votes was based upon the constitutionally irrelevant factor of location or geography. Geography, however, is only a factual accident of the apportionment cases. It is an example of a constitutionally irrelevant factor, but certainly not the only one in existence. The clue to violation of equal protection lies in the dilution by the state of the right of a qualified voter to his whole and undivided vote.

> ". . . . Once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the equal protection clause of the 14th Amendment." *Harper v. Virginia State Board of Elections,* 383 U.S. 663, 665, 16 L.Ed.2d 169, 86 S. Ct. 1079 (1966).

Gray v. Sanders, 372 U.S. 368, 9 L.ed.2d 821, 83 S. Ct. 801 (1963) rebuts the argument that the voting rights cases are limited to geographical discrimination between classes of voters or to elections involving the choice of representatives by voters. *Gray* in fact involved a statewide general election in which all types of public officers were chosen, not just representatives to a legislative body. Justice Clark writing for the majority describes the case:

> "This case, unlike *Baker v. Carr, supra,* does not involve a question of the degree to which the Equal Protection Clause of the Fourteenth Amendment limits the authority of a State Legislature in designing the geographical districts from which representatives are chosen either for the State Legislature or for the Federal House of Representatives. . . .
>
> "Nor does the question here have anything to do

with the composition of the state or federal legislature." 372 U.S. at 376, 378.

The point is made crystal clear in the concurring statement of Justice Stewart in which Justice Clark joined:

> "We do not deal here with 'the basic ground rules implementing *Baker v. Carr.*' This case, on the contrary, involves statewide elections of a United States Senator and of state executive and judicial officers responsible to a statewide constituency. Within a given constitutency, there can be room for but a single constitutional rule—one voter, one vote. *United States v. Classic,* 313 U.S. 299, 85 L.Ed. 1368, 61 S. Ct. 1031." 372 U.S. at 382.

What this landmark case does hold is simply put by the court:

> "Georgia gives every qualified voter one vote in a statewide election; but in counting those votes, she employs the county unit system which in end result weights the rural vote more heavily than the urban vote and weights some small rural counties heavier than other larger rural counties. . . .
>
> "Every voter's vote is entitled to be counted once. It must be correctly counted and reported. As stated in *United States v. Mosely,* 238 U.S. 383, 386, 35 S. Ct. 904, 905, 59 L.Ed. 1355, 'the right to have one's vote counted' has the same dignity as 'the right to put a ballot in a box.' It can be protected from the diluting effect of illegal ballots. *Ex parte Siebold,* 100 U.S. 371, 25 L.Ed. 717; *United States v. Saylor,* 322 U.S. 385, 64 S. Ct. 1101, 88 L.Ed. 1341. And these rights must be recognized in any preliminary election that in fact determines the true weight a vote will have. See *United States v. Classic, supra; Smith v. Allwright, supra.* . . .
>
> "The only weighing of votes sanctioned by the Constitution concerns matters of representation, such as the allocation of Senators irrespective of population and the use of the electoral college in the choice of a

President. Yet when Senators are chosen, the Seventeenth Amendment states the choice must be made 'by the people.' Minors, felons, and other classes may be excluded. See *Lassiter v. Northampton County Election Board, supra,* 360 U.S. p. 51, 79 S. Ct. p. 990. *But once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded.* As we stated in *Gomillion v. Lightfoot, supra,* 364 U.S. p. 347, 81 S. Ct. p. 130:

"'When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right.'

"The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote." (Emphasis added). 372 U.S. at 379-381.

3. There Is No Valid Distinction Between Denial of the Vote and Dilution of the Vote

Four important United States Supreme Court cases have clearly extended the Equal Protection Clause to voting rights discriminations not even remotely arising out of either legislative apportionment or geographic location: *Cipriano v. City of Houma,* 395 U.S. 701, 23 L.ed.2d 647, 89 S. Ct. 1897 (1969), where the state statute allowed only property owners to vote on the issuance of muncipal revenue bonds; *City of Phoenix v. Kolodziejski,* 90 S. Ct. 1990 (1970), where the state statute allowed only property owners to vote on the issuance of muncipal general obligation bonds; *Kramer v. Union Free School District,* 395 U.S. 621, 23 L.Ed.2d 583, 89 S. Ct. 1886 (1969), where the state statute limited voters in a school board election to property owners or parents of enrolled children; and *Carrington v.*

Rash, 380 U.S. 89, 13 L.ed.2d 675, 85 S. Ct. 775 (1965), where the state statute prevented members of the Armed Forces from voting in Texas elections. All of these statutes were struck down under the Equal Protection Clause. It may be argued that these cases are not relevant here because they involved "the outright denial of the right to vote based on an unjustifiable classification." This argument asserts that the denial of the vote somehow presents an equal protection question different in *kind* from diluting the vote. This reasoning stretches the principles of equal protection to the breaking point. It could not logically be contended that the court in *Cipriano or Kolodziejski* would have ruled otherwise if the non-property owning voter had been given half a vote instead of none.

We submit that there is no legal or logical distinction between diluting a man's vote and denying him the vote. If one-man-one-vote means anything, it means that once the state grants the franchise each man's vote must count equally.

As Justice Douglas stated in *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 16 L.ed.2d 169, 86 S. Ct. 1079 (1966):

> "The degree of the discrimination is irrelevant." 383 U.S. at 668.

4. There Is No Valid Distinction Between Public Voting for Elected Officers and Public Voting on Issues

It may be argued that vote dilution runs afoul of equal protection only when applied to the election of representatives and not when applied to a public election on issues. The logic of this position escapes us. Should a different

standard apply to the voter who directly casts a vote on a school budget than to the voter when he casts a vote for school directors who would in turn set the budget? In each case is not each voter entitled to have his vote counted equally to determine the result? In *Kramer*, the voter was protected from discrimination in his election of school board members. In *Cipriano*, the voter was protected from discrimination in an election on a municipal revenue bond issue. In *Kolodziejski*, the voter was protected from discrimination in an election on a municipal general obligation bond issue.

The rule is aptly stated in *Hadley v. Junior College District*, 397 U.S. 50, 25 L.ed.2d 45, 90 St. Ct. 791 (1970):

> "When a court is asked to decide whether a state is required by the constitution to give each qualified voter the same power in an election open to all, there is no discernible, valid reason why constitutional distinctions should be drawn on the basis of the purpose of the election." 397 U.S. at 54.

Some point out that the State of West Virginia could have provided for no election at all on bond issues and excess levies. This is correct but irrelevant. The fact is that the State of West Virginia *did* provide for a public election. The court in *Kramer* makes it crystal clear that:

> "The need for exacting judicial scrutiny of statutes distributing the franchise is undiminished simply because, under a different statutory scheme, the offices subject to election might have been filled through appointment." 395 U.S. at 628.

It has also been asserted that special bond and levy elections are outside the reach of the Equal Protection Clause because they are not as centrally important to our system of representative government as elections for rep-

resentatives. But, neither the type of public election nor the "importance" of the public officer to be elected is significant in determining whether an equal protection question should be examined with the closest scrutiny and meet the strict test of "compelling" state interest. In *Kramer*, the elected offices were local school board members with limited powers but the court makes it clear that it is the fact of their *election* rather than the extent of their legislative duties that counts:

> "Nor is the need for close judicial examination affected because the district meetings and the school board do not have 'general' legislative powers. Our exacting examination is not necessitated by the *subject* of the election. . . ." 395 U.S. at 629.

THE STATE MAY NOT DILUTE THE VOTE OF ANY VOTER BECAUSE OF HOW HE MAY VOTE

One of the most potentially dangerous of all voting right discriminations inheres in the classification of voters according to how they may vote in a public election. Weighted voting provisions make precisely such a classification.

In *Carrington v. Rash*, 380 U.S. 89, 13 L.ed.2d 675, 85 S. Ct. 775 (1965), the court struck down a provision of the Constitution of the State of Texas because it denied servicemen the right to vote. Texas presented a variety of plausible reasons for denying the vote to servicemen. The following quotation from this decision is particularly appropriate to the discrimination inherent in weighted voting provisions:

> "The theory underlying the State's first contention is that the Texas constitutional provision is necessary to prevent the danger of a 'takeover' of the civilian community resulting from concentrated voting by

large numbers of military personnel in bases placed near Texas towns and cities. A base commander, Texas suggests, who opposes local police administration or teaching policies in local schools, might influence his men to vote in conformity with his predilections. *Local bond issues may fail, and property taxes stagnate at low levels because military personnel are unwilling to invest in the future of the area.* We stress—and this is a theme to be reiterated—that Texas has the right to require that all military personnel enrolled to vote be bona fide residents of the community. But if they are in fact residents, with the intention of making Texas their home indefinitely, they, as all other qualified residents, have a right to an equal opportunity for political representation . . . *'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible. '[T]he exercise of rights so vital to the maintenance of democratic institutions . . . cannot constitutionally be obliterated because of a fear of the political views of a particular group of bona fide residents.'* " (Emphasis added). 380 U.S. at 93, 94.

In *Cipriano v. City of Houma*, 395 U.S. 701, 23 L.ed.2d 647, 89 S. Ct. 1897 (1969), the court observes that property owners may have a different point of view on the issuance of utility bonds than rate payers but holds that these differences of opinion are not a proper basis for giving one group the right to vote on such bonds and denying it to another. Such a classification was held not to be necessary to promote a compelling state interest.

VOTING PROCEDURES AND STANDARDS FOR LEGISLATIVE BODIES ARE INHERENTLY DIFFERENT FROM THOSE APPLICABLE TO POPULAR ELECTIONS

The argument may be made that a popular election with secret ballot and thousands of voters should legally be

governed by the same weighted voting standards which often apply to the internal functioning of a deliberative legislative body. We concede that both the voters on election day and the legislators during their legislative session decide public issues. There the similarity ends. Extending equal protection standards to apply to the *internal* state legislative process has not been suggested by the courts.

A deliberative legislative body votes openly; the voter acts by secret ballot. The legislature must establish a variety of procedural rules in order to function in a truly deliberative fashion; the voter must simply come to the polls and mark his ballot. Committee systems and party caucuses are established in a legislative body and procedures are set for public hearings, study, investigation, debate, consideration of amendments, the interrelation of committee assignments within each house and between houses and with the Governor as a legislative partner; qualifications are fixed for members of the legislature to sit as members, to serve on committees or in caucus. The inherent nature of the integral parts of the legislative voting process set a deliberative body apart from the voters at a public election.

A popular election is not a creative, amendatory, deliberative process. Each person has only one official function as a voter. He enters the booth and, in secret, votes "Yes" or "No." He is like every other voter when he enters this booth. The Equal Protection Clause guarantees him this right—no more, no less.

Whether or not the long arm of the Equal Protection Clause will ever reach the internal functioning of the legislature of a state is not now before this court and

voting procedures of legislative bodies give inapt analogies for the consideration of rights of voters at a public election.

FORM OF RELIEF

If the court holds that the weighted voting provisions of the West Virginia Constitution and statutes violate the Equal Protection Clause of the United States Constitution, the court must then determine the form of relief to be granted. The effect to be given the instant decision should be governed by the rule set forth in *Cipriano v. City of Houma*, 395 U.S. 701, 23 L.ed.2d 647, 89 S. Ct. 1897 (1969). In *Cipriano*, the court held that its decision would apply:

> "... only where, under state law, the time for challenging the election result has not expired, or in cases brought within the time specified by state law for challenging the election and which are not yet final." 395 U.S. at 706.

The rule in *Cipriano* was further amplified by the court in *City of Phoenix v. Kolodziejski*, 90 S. Ct. 1990 (1970):

> "We therefore adopt a rule similar to that employed with respect to the applicability of the *Cipriano* decision: our decision in this case will apply only to authorizations for general obligation bonds which are not final as of June 23, 1970, the date of this decision. In the case of States authorizing challenges to bond elections within a definite period, all elections held prior to the date of this decision will not be affected by this decision unless a challenge on the grounds sustained by this decision has been or is brought within the period specified by state law. In the case of States, including apparently Arizona, that do not have a well-defined period for bringing challenges to bond elections, all elections held prior to the date of this decision that have not yet been challenged on the grounds sustained in this decision prior to the date of this decision will not be open to challenge

on the basis of our ruling in this case." 90 S. Ct. 1996.

The rules set forth in *Cipriano* and *Kolodziejski* are in accord with sound public policy and should be followed in the instant case.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Supreme Court of Appeals of the State of West Virginia be affirmed.

Respectfully submitted,

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APPENDIX A

COMPARISON OF PROPERTY TAX BURDEN BETWEEN STATES WITH WEIGHTED VOTING AND STATES WHICH DO NOT WEIGHT VOTING

	Property Taxes in Dollars per $1,000 of Personal Income*
United States Average	44.39
Median State	44.65
States with Extraordinary** Majority Vote Requirements (Weighted Voting) in Certain Local Bond Issue Elections	
Wyoming	69.21
South Dakota	68.44
California	61.92
Nebraska	60.60
North Dakota	59.66
Massachusetts	57.78
New Hampshire	55.38
Iowa	55.28
New York	50.53
Vermont	49.58
Idaho	46.61
Michigan	45.30
Texas	40.76
Washington	36.58
Missouri	36.12
Oklahoma	32.35
Mississippi	28.74
West Virginia	27.29
Tennessee	27.22
Kentucky	25.16

*Source: Advisory Commission on Intergovernmental Relations, State and Local Finances, Significant Features 1967 to 1970 M-50 (November 1969) at p. 26.

**Source: Compilation set forth in Practising Law Institute, Municipal Bond Problems—3 D, Course Handbook Series No. 18 (1970) at p. 243.

States Without Extraordinary** Majority Vote Requirements in Local Bond Issue Elections

	Property Taxes in Dollars per $1,000 of Personal Income
Montana	68.48
Arizona	56.70
Minnesota	56.55
New Jersey	55.03
Kansas	54.99
Colorado	52.76
Nevada	51.14
Wisconsin	50.99
Oregon	49.89
Maine	48.74
Utah	47.91
Connecticut	47.52
Indiana	46.28
Rhode Island	44.65
Ohio	42.83
Florida	41.39
Maryland	40.86
Illinois	40.56
Georgia	30.26
Pennsylvania	29.68
Vermont	28.77
Hawaii	26.52
North Carolina	26.50
Arkansas	25.54
New Mexico	25.18
Alaska	24.83
Louisiana	23.00
South Carolina	21.06
Delaware	20.46
Alabama	15.79

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 96

A. T. GORDON, et al.,
Petitioners,

vs.

GRANVILLE H. LANCE, et al.,
Respondents.

On Writ of Certiorari to the Supreme Court of Appeals of West Virginia

BRIEF

Amicus Curiae on Behalf of the "Committee for the Equal Weighting of Votes" in Support of the Position of the Respondents

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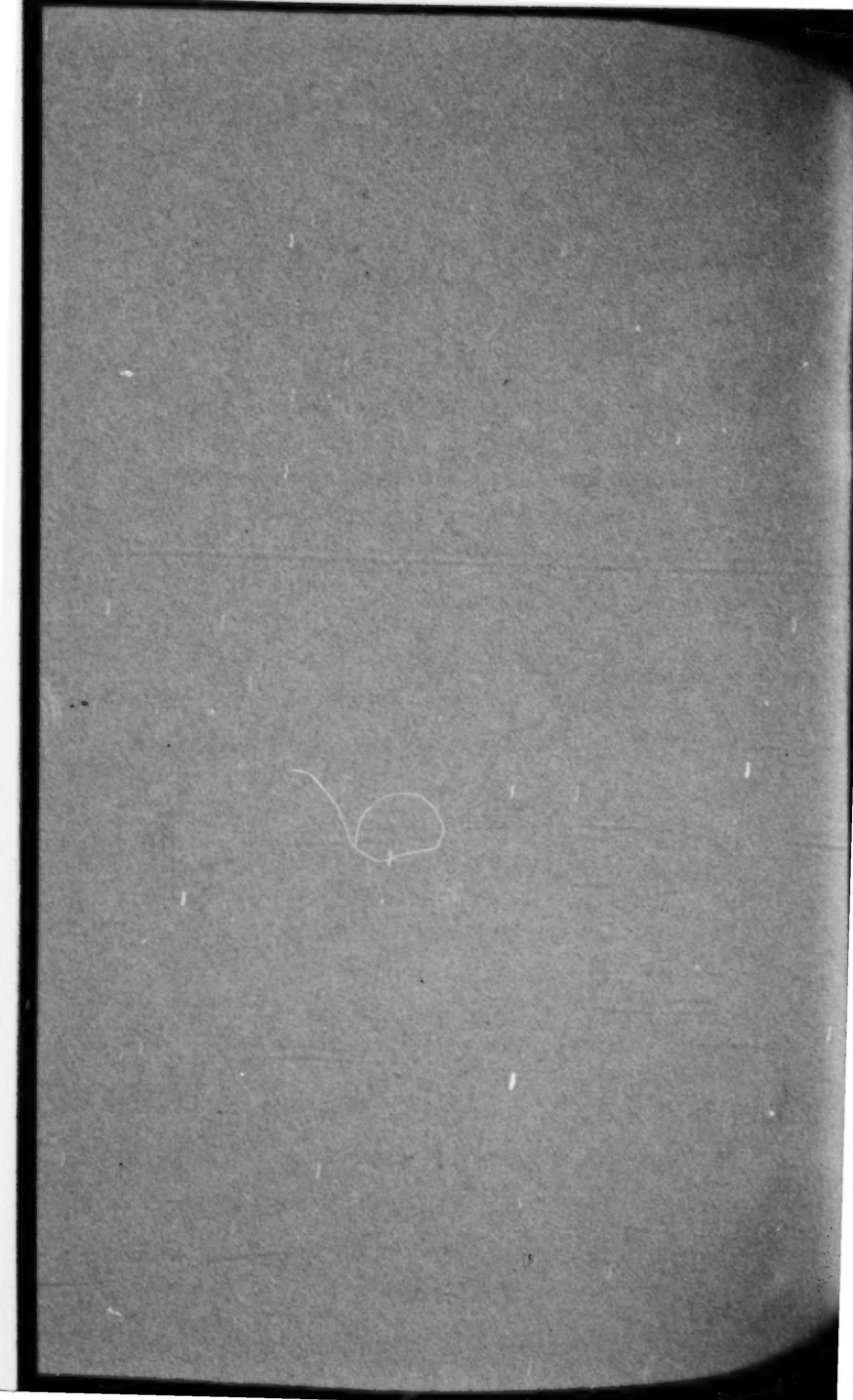

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IN THE

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On Writ of Certiorari to the Supreme Court of Appeals of West Virginia

BRIEF

Amicus Curiae on Behalf of the "Committee for the Equal Weighting of Votes" in Support of the Position of the Respondents

This brief Amicus Curiae is filed with the written consent of the parties, duly filed with the Clerk of this Court, pursuant to Rule 42 of this Court.

This brief is in support of the position of the Respondents who maintain that those provisions of the West Virginia constitution and statutes, which require three-fifths (60%) voter approval of school bond issues or of school tax levies, are repugnant to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and that only a simple majority is required.

THE INTEREST OF THE "COMMITTEE FOR THE EQUAL WEIGHTING OF VOTES"

The "Committee for the Equal Weighting of Votes" is a committee comprised of plaintiffs in three cases pending before a three-judge panel of the United States District Court for the Eastern Division of the Eastern District of Missouri.*

These cases seek a determination that those provisions of the Missouri constitution and implementing statutes which require a two-thirds (66⅔%) voter approval for bonds of a city or of a school district or for certain school tax levies are repugnant to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and that only a simple majority is required for validating a bond issuance or a tax levy.

These three cases were heard, submitted, and briefed.

The three-judge panel subsequently issued its order deferring its decision until after the United States Supreme Court had heard and decided the instant West Virginia case (October Term, Docket No. 96) now before this Court.

The "Committee for the Equal Weighting of Votes" is filing this brief Amicus Curiae because this Court's decision in the instant case may be dispositive of the issues of the three cases before the three-judge panel of the Eastern Division of the Eastern District of Missouri.

---

* These cases are: Preisler, et al., v. The Mayor of the City of St. Louis, et al., Docket No. 69C 250 (1), city bonds; Glaser, et al., v. The Board of Education of the School District of University City, Docket No. 69C 284 (2), school tax levy; and Preisler, et al., v. The Board of Education of the School District Constituted of the City of St. Louis, et al., Docket No. 69C 339 (1), school bonds.

The position of the "Committee for the Equal Weighting of Votes", that only a simple majority is required for the adoption of a proposition for a bond issue or a tax levy of a school district or other subdivision of the State, has received wide public support from organizations** and individual citizens of the St. Louis metropolitan area and of Missouri.

SUMMARY OF ARGUMENT

The principal and fundamental issue of the instant case is the constitutional right of an individual, under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, to cast an equally weighted vote in a public election on propositions authorizing school bonds and school tax levies.

The equal weighting of votes in elections on propositions is an inherent, though unexpressed, constitutional right.

This case stands upon its own facts and issues and need not be considered merely as an extension of the "one person, one vote" doctrine developed by this Court in the apportionment and districting cases. The phrase actually implies *equality* and might more accurately be expressed "one person, one *whole* vote."

However, the now vast number of apportionment and districting cases are helpful to the solution of the issues of the instant case because they declare the right of the

---

** Missouri State Teachers Association; Missouri State Labor Council, AFL-CIO; Missouri Municipal League; American Civil Liberties Union of Eastern Missouri; American Civil Liberties of Western Missouri; Cooperating School Districts of the St. Louis Suburban Area; St. Louis Suburban Teachers Association; St. Louis [City] Teachers Association; St. Louis Labor Council, AFL-CIO; St. Louis [City] Teachers Union, AFL-CIO; League of Women Voters of Missouri; American Federation of Teachers, AFL-CIO [national].

qualified voter to an equally weighted vote in situations which are far less obvious and precise than the fixed three-fifths majority requirement of the West Virginia constitution and statutes which extraordinary majority requirement invariably and indisputedly results in an invidiously discriminatory "NO" vote with one and one-half (1½) times, or 150%, the weight of a "YES" vote, which is constitutionally impermissible.

The inherent constitutional right to an *equally weighted* vote has always existed; however, it has been kept from view and consideration, as in the instant case, because of the *mode of expressing* or the *wording* of the West Virginia three-fifths extraordinary majority constitutional and statutory provisions which detracts attention from the comparatively unequal weighting of the "NO" and the "YES" votes. This is a sophisticated mode of discrimination and, as this Court said in *Reynolds v. Sims*, 377 U. S. 533, 563 (1964), "One must be ever aware that the Constitution forbids 'sophisticated as well as simple-minded modes of discrimination'."

Neither the people nor the legislature of a sovereign state have the power to enact state constitutional provisions or legislation repugnant to the provisions of the Equal Protection Clause of the United States Constitution. "An individual's constitutionally protected right to cast an equally weighted vote cannot be denied even by a vote of a majority of the State's electorate, . . .", said this Court in Lucas v. Forty-fourth General Assembly of Colorado, 377 U. S. 713, 736 (1964).

There is no state interest so compelling that it can override the individual citizen's right to an equally weighted vote in any instance in which a proposition affecting the health, welfare, or education of the citizen or his dependents is being submitted to a vote.

The West Virginia Supreme Court of Appeals in the instant case, 170 S. E. 2d 783 (1969) said, on page 791:

> "[3] For the reasons stated in this opinion, we are of the opinion, and accordingly the Court holds, that *the three-fifths vote requirement* of Article X, Section 8 of the Constitution of West Virginia and Sections 4 and 14 of Article 1, Chapter 13, Code, 1931, as amended, and *also the sixty percent requirement* of Article X, Section 1 of the Constitution of West Virginia and Section 16 of Article 8, Chapter 11, Code, 1931, as amended, *are in conflict with and violative of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States and that, therefore, such provisions are void and unenforceable. . . .*" (Emphasis supplied.)

The "Committee for the Equal Weighting of Votes" respectfully urges the Court to find the challenged constitutional and statutory sections of the instant case violative of the Equal Protection Clause of the United States Constitution, void and unenforceable, and to find further that only a simple majority of votes cast is necessary for the adoption of the propositions for the school bond issue and the school tax levy.

ARGUMENT

I

The right of a voter to cast an equally weighted vote in a public election on propositions authorizing school bonds and school tax levies is protected by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

The right of a voter to cast an *equally weighted vote* in a public election is an inherent, though not expressed, right in the electoral processes of a democracy. That a right is not enumerated in either the United States Constitution or a state constitution is no impediment to the existence of the right. [*People v. Belous,* 80 Cal. 354, 360 (1969), cites examples of such unenumerated but existing rights.]

The basic right to an equally weighted vote on propositions submitted to the electorate is protected by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Thus the United States Supreme Court, in *Reynolds v. Sims,* 377 U. S. 533 (1964), at page 555 said:

> "*The Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections* . . . And [*that*] *the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.*" (Emphasis supplied.)

and in *Gray v. Sanders,* 372 U. S. 368 (1963), in discussing the complicated Georgia county unit voting system which resulted in a weighting of the votes in less populous coun-

ties more heavily than the votes of the more populous counties, the Court, at page 381, said:

> "... *But once the class of voters is chosen and their qualifications specified, we can see no constitutional way by which equality of voting power can be evaded.* ..."
>
> "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, and Nineteenth Amendments, can mean only one thing—*one person, one vote.*" (Emphasis supplied.)

The instant case is not to be considered solely as an extension of the "one person, one vote" doctrine enunciated by this Court but is independently and of itself founded on the constitutional concepts of the Equal Protection Clause, perhaps more accurately to be called, "one person, one *whole* vote".

The inherent constitutional right to an equally weighted vote always existed; however, in the extraordinary majority voting requirements it has been kept from view and consideration because of the *mode of expressing* or the *wording* of the three-fifths majority constitutional and statutory provisions which detracted attention from the comparatively and grossly unequal weighting of the "NO" and the "YES" votes which were thereby created.

The equality of the vote was first succinctly expressed by this Court in *Gray v. Sanders,* above, 372 U. S. 368, 381 (1963), as "one person, one vote". There had been many state supreme court decisions, in the nearly half-century before *Baker v. Carr,* 369 U. S. 186 (1962), in which the state courts had decided that legislative apportionment or districting within a state was unconstitutional under *state* constitutional *provisions requiring equally populated districts.* The federal court decisions following *Baker v.*

Carr, however, are based on the judicial construction of the Equal Protection Clause of the Fourteenth Amendment [*Reynolds v. Sims,* 377 U. S. 533 (1964), through *Hadley v. Junior College District,* 397 U. S. 50 (1970)] and Article I, Section 2, [*Wesberry v. Sanders,* 376 U. S. 1 (1964) through *Kirkpatrick v. Preisler,* 394 U. S. 526 (1969)] of the United States Constitution. The federal cases decided on the basis of the Equal Protection Clause found that one person's vote was unconstitutionally debased or diluted or unequally weighted if the maximum population difference between districts was sufficiently great as to cause invidious discrimination between voters residing in different districts.

There is no necessity in the instant case of interpreting the *meaning* or *intent* of the words of the West Virginia Constitution; the *three-fifths requirement* is *clear and invariable.* In this respect the instant case is unlike the apportionment and districting cases where the population disparities between districts were of different magnitudes and constantly changing. Since inequality of the weight of the votes of voters arising from a difference of a few percent of population of districts has been found in the by now numerous cases to be individiously discriminatory to some voter, then such a difference as fifty percent in the effective weight of a voter's vote is unquestionably discriminatory.

In the instant case, *Lance v. Board of Education of Roane County,* on page 790, the West Virginia Supreme Court of Appeals considers the general principles of equality of vote weighting to apply to the instant case, saying:

> "We are of the opinion that the 'one person, one vote', principle is now firmly established in broad general terms without qualification or exception. Certainly the right of the voter to equal protection, the

right to protection against the dilution or debasement of the weight or force of an individual's vote, is fully as sound, sacred and important when he is voting on issues involving taxation, public revenue and the promotion of an adequate public school system, as when he is voting for the nomination or election of a constable, a state senator, a governor or any other public official to represent the voter in government."

And, at page 791, the West Virginia Court continues:

"If the right of a voter can be legally diluted or debased by the sixty percent requirement, it would seem to follow necessarily that it could be further diluted or debased legally by a seventy-five or a ninety percent requirement. In other words, if the weight and force of a person's vote can be debased and diluted in accordance with the contention of the defendants in this case, we see no escape from the conclusion that the weight and force of such a vote may legally be debased and diluted virtually to the point of total extinction."

Obviously the Court supports an equally weighted vote and considers any extraordinary majority invalid.

This Court states its principle on the equal weighting of votes in *Hadley v. Junior College District*, 397 U. S. 50 (1970), as follows, at page 54:

"*This Court* has consistently *held* in a long series of cases, that *in situations involving elections*, the *States are required to insure that each person's vote counts as much*, insofar as it is practicable, *as any other person's*. We have applied this principle in congressional elections, state legislative elections, and local elections. The consistent theme of those decisions is that *the right to vote* in an election *is protected* by the United States Constitution *against dilution or debasement*.

> "When a court is asked to decide whether a State is required by the Constitution to give each qualified voter the same power in *an election open to all, there is no discernible, valid reason why constitutional distinctions should be drawn on the basis of the purpose of the election.*" (Emphasis supplied.)

and this Court concludes, at page 59, saying:

> "[B]ut once a state has decided to use the process of popular election and 'once the class of voters is chosen and their qualifications specified, we see *no constitutional* way *by which equality* of voting power *may be evaded.' Gray v. Sanders*, 372 U. S. 368, 381 (1963)." (Emphasis supplied.)

II

The right to cast an equally weighted vote may not be impaired because of the WAY in which the voter voted. The minority frustrates the will of the majority by the unconstitutional device of the unequal weighting of the vote of the individual voter resulting from the extraordinary majority requirements.

The *gross and invidiously discriminatory inequality* of the *weight* of the vote of the voter who votes affirmatively, "YES", as compared to the *weight* of the vote of the voter who votes negatively, "NO", in an election which by law requires a three-fifths majority for adoption of a proposition *is not apparent from such statements of the law* appearing in the West Virginia constitution and implementing statutes as follows: in Article X, Section 1 of the Constitution of West Virginia, "*[n]o increase shall be effective unless at least sixty percent of the qualified voters shall favor such increase.*"; in Section 16 of Chapter 11, Article 8 of the West Virginia Code, "*[I]f at least sixty cent of the voters cast their ballots in favor of the addi-*

tional levy, the local levying body may impose the additional levy."; in Article X, Section 8 of the Constitution, "*[s]hall have first been submitted to a vote of the people, and have received three-fifths of all of the votes cast for and against the same.*"; and in Sections 4 and 14, of Chapter 13, Article 1 of the Code, "*[I]f three-fifths of all of the votes cast for and against the proposition to incur debt and issue negotiable bonds shall be in favor of the same,*".

And Justice Black dissenting in *Colegrove v. Green*, 328 U. S. 549 (1946), overruled in effect by *Baker v. Carr*, said at page 569:

> "[The] 'equal protection clause of the Fourteenth Amendment forbids . . . discrimination. It does not permit the States to pick out certain qualified citizens or groups of citizens and deny them the right to vote at all. . . . *No one would deny that the equal protection clause would also prohibit a law that would expressly give certain citizens a half-vote and others a full vote.* . . .
> Such discriminatory legislation seems to be exactly what the equal protection clause was intended to prohibit.' " (Emphasis supplied.)

And as Justice Douglas dissenting in *MacDougal v. Green*, 355 U. S. 281 (1948), [overruled in *Moore v. Ogilvie*, 394 U. S. 814 (1969)], said at pages 288 and 290:

> "Free and honest elections are the very foundation of our republican form of government . . . Discrimination against any group or class of citizens in the exercise of these constitutionally protected rights deprives the electoral process of integrity.
>
> "None would deny that *a state law giving some citizens twice the vote of other citizens in either primary or general election would lack that equality which the*

> *Fourteenth Amendment guarantees . . . The theme of the Constitution is equality among citizens in the exercise of their political rights. The notion that one group can be granted greater voting strength than another is hostile to our standards* for popular representative government." (Emphasis supplied.)

In the instant case, the voters are equally qualified, yet the State Constitution and implementing statutory provisions require, in effect, that the negative, "NO," votes are weighted one and one-half (1½) times, or 150%, as much as the affirmative, "YES," votes by the imposition of the three-fifths majority requirement. *There can be no acceptable basis for such a distinction between qualified voters.* Once the class of qualified voters has been established, this Court has not recognized any acceptable basis for deviation from its "one person, one vote" principle which *implies equality*, that is, "one person, one *whole* vote."

The application of the three-fifths rule *generates* two classes of voters, voters who voted "NO" and voters who voted "YES" and, as such, the individual "NO" votes are grossly and invidiously discriminatory being unequally weighted as between members of the two classes formed.

The three-fifths majority requirement of the instant case is unconstitutional because it allows a *minority*, selected solely on the basis of *the way* its voters voted, to frustrate the will of the *majority* who voted the other way.

However, the vast number of *apportionment and districting cases* are helpful to the solution of the issues of the instant case because they *declare the right to an equally weighted vote in discriminatory situations which are far less obvious and precise than the three-fifths majority requirement* which is fixed and invariable and *indisputably results in a "NO" vote with one and one-half*

(1½) *times, or 150%, the weight of a "YES" vote,* which result is *constitutionally impermissible.*

In *Bogert v. Kinzer* (Idaho Supreme Court), 465 P. 2d 639, 650 (1970), Judge Donaldson, dissenting, commented that the Equal Protection Clause *applied* to a dilution of the vote in a municipal bond election by virtue of the two-thirds requirement, saying:

> "• • • [i]t is not disputed that by requiring a ⅔ majority of favorable votes to pass a bond issue that negative voters have twice as much voting power in the bond election as to the affirmative voters. Apart from this discrepancy there is no difference in the qualifications of the voters. Therefore there is discrimination. However it is not directed at sex, residence, color, economic status, or geographic location, but it is directed at *a class of persons who happen to hold a particular point of view* and results in a *functional discrimination.* That a point of view may not be discriminated against is clear from Carrington v. Rash, 380 U. S. 89, 85 S. Ct. 775, 13 L. Ed. 2d 675 (1965),
>
> > '• • • [*f*]*encing out from the franchise* a sector of the population *because of the way they may vote is constitutionally impermissible.*' 380 U. S. 89, 94.
>
> *It is a sophisticated rather than simple minded discrimination* since the debasement or dilution only occurs when the voter decides upon which place on the ballot to place his 'X'. The United States Supreme Court said in Reynolds v. Sims, *supra, 'One must be ever aware that the Constitution forbids "sophisticated as well as simple minded modes of discrimination".'* " (Emphasis supplied.)

The California Supreme Court in *Westbrook v. Mihaly,* Sup., 87 Cal. Reptr. 839 (1970), supports the conclusion

that the extraordinary majority requirements discriminated between affirmative and negative votes, saying at page 851:

> "[12] Next, we are advised that because section 18 deprives no one of his right to vote on bond propositions and because each vote is 'fully counted,' there is no discrimination, invidious or otherwise, against which the equal protection clause historically has been directed. It is always easier to assume away a problem than to resolve it. However, we think respondents' suggested assumption distorts reality. It does not require extended discussion to establish that the inevitable result of any extraordinary majority requirement is to give to one group of voters a greater influence on the outcome of an election than to another group of comparable size but opposite conviction. This is the functional equivalent of according to each person in the former group a vote of relatively greater weight precisely because of his position on the issue which is to be decided. In other words, a result identical to that produced by a two-thirds vote requirement could be achieved by requiring only a 50 percent affirmative vote for passage of bond issue propositions but providing that in tabulating the election results each negative vote would be multiplied by two while affirmative votes would be counted at face value. Alternatively, those citizens who opposed a measure could be permitted to vote twice while those who favored it were limited to only one ballot. The biased structure of both of these voting schemes is perhaps more obvious than the discrimination inherent in an extraordinary majority vote requirement. The effect of each, of course, is identical. "If a State in a statewide election weighted the male vote more heavily than the female vote or the white vote more heavily than the Negro vote, none could successfully contend

that the discrimination was allowable. [Citation.]" (Gray v. Sanders, *supra*, 372 U. S. 368, 379, 83 S. Ct. 801, 808.)[35]

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[35] As stated by Justice Black, dissenting, in *Colegrove v. Green*, supra, 328 U. S. 549, 569-570, 66 S. Ct. 1198, 1210: "No one would deny that the equal protection clause would * * * prohibit a law that would expressly give certain citizens a half-vote and others a full vote. * * * [T]he Constitutionally guaranteed right to vote and the right to have one's vote counted clearly imply the policy that state election systems, no matter what their form, should be designed to give approximately equal weight to each vote cast." See also the opinion of Justice Douglas, dissenting, in South v. Peters (1950), 339 U. S. 276, 279, 70 S. Ct. 641, 643, 94 L. Ed. 834: 'There is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth. The right to vote includes the right to have * * * the vote counted at full value without dilution or discount [citation] * * *. That federally protected right suffers substantial dilution * * * [where a] favored group has full voting strength * * * [and] [t]he groups not in favor have their votes discounted.'"

Although the question of whether such discrimination is allowable has not been settled by the Fifteenth or the Nineteenth Amendment, we think it equally apparent that when a state weights the negative vote more heavily than the affirmative vote, no one can successfully contend that there is *no* discrimination."

III

The electorate is not empowered to enact state constitutional or statutory provisions which impair the citizen's right under the Equal Protection Clause to an equally weighted vote on propositions for school bonds and tax levies.

Provisions of the West Virginia Constitution enacted by the people, as here in the instant case, when repugnant to the provisions of the Equal Protection Clause of the Four-

teenth Amendment to the United States Constitution, are invalid and void.

The lack of power of the people of a sovereign state to enact state constitutional provisions or legislation repugnant to the provisions of the Equal Protection Clause of the United States Constitution is extensively discussed in one of the leading apportionment or districting cases, *Lucas v. Colorado General Assembly,* 377 U. S. 713 (1964). In this case, the electorate of the State of Colorado enacted, by a majority of the voters voting on the question, a constitutional amendment apportioning the State; this apportionment was held to be invalid under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The United States Supreme Court said, at page 736:

> "*An individual's constitutionally protected right to cast an equally weighted vote cannot be denied even by a vote of a majority of a State's electorate,* if the apportionment scheme adopted by the voters fails to measure up to the requirements of the Equal Protection Clause. Manifestly, the fact *that an apportionment plan is adopted in a popular referendum is insufficient to sustain its constitutionality* or to induce a court of equity to refuse to act. As stated by this Court in *West Virginia State Bd. of Educ. v. Barnette,* 319 U. S. 624, 638, '*One's right to life, liberty, and property . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.*' "[29] (Emphasis supplied.)

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[29] And, as stated by the court in *Hall v. St. Helena Parish School Bd.*, 197 F. Supp. 649, 659 (D. C. E. D. La. 1961), aff'd, 368 U. S. 515, "*No plebiscite can legalize an unjust discrimination.*" (Emphasis supplied.)

And at pages 736 and 737 the Court said:

"A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be."[30] **(Emphasis supplied.)**

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[30] In refuting the majority's reliance on the fact that Amendment No. 7 had been adopted by a vote of the Colorado electorate, Judge Doyle, in dissenting below, stated:

"The protection of constitutional rights is not to be approached either pragmatically or expediently, and though the fact of enactment of a constitutional provision by heavy vote of the electorate produces pause and generates restraint *we can not,* true to our oath, *uphold such legislation in the face of palpable infringement of rights.* Thus,, state racial legislation would unquestionably enjoy overwhelming electorate approval in certain of our states, yet no one would argue that this factor could compensate for manifest inequality. It is too clear for argument that constitutional law is not a matter of majority vote. Indeed, *the entire philosophy of the Fourteenth Amendment teaches that it is personal rights which are to be protected against the will of the majority.* The rights which are here asserted are *the rights of the individual plaintiffs to have their votes counted equally with those of other voters.* . . . [T]o say *that a majority of the voters today indicate a desire to be governed by a minority, is to avoid the issue which this court is asked to resolve.* It is no answer to say that the approval of the polling place necessarily evidences a rational plan. *The plaintiffs have a right to expect that the cause will be determined in relation to the standards of equal protection. Utilization of other or different standards denies them full measure of justice."* 219 F. Supp. 922, at 944. (Emphasis supplied.)

"We hold that the fact that a challenged legislative apportionment plan was approved by the electorate is without federal constitutional significance, if the scheme adopted fails to satisfy the basic requirements of the Equal Protection Clause as delineated in our opinion in Reynolds v. Sims. **And we conclude that the fact that a practicably available political remedy, such as initiative and referendum, exists under state law provides justification only for a court of equity to stay its hand temporarily while recourse to such a remedial device is attempted or while proposed initiated measures relating to legislative apportion-**

ment are pending and will be submitted to the State's voters at the next election." (Emphasis supplied.)

The California Supreme Court in *Westbrook v. Mihaly*, Sup., 87 Cal. Rptr. 839 (1970), *cites with approval* at page 861 [18, 19] the foregoing paragraphs from *Lucas v. Colorado General Assembly* saying:

> "More fundamentally, *popular approval* of electoral systems which *infringe* an individuals' constitutionally protected right to cast an equally weighted vote *is irrelevant.*" (Emphasis supplied.)

The electorate cannot constitutionally enact under the Equal Protection Clause such provisions as those requiring that three-fifths of the voters voting must approve the school bond issue or school tax levy. It is immaterial whether the three-fifths requirement was proposed by a constitutional convention, the General Assembly, or even by the initiative, and then presented to and ratified by the people. This was clearly indicated by the United States Supreme Court in *Lucas v. Colorado General Assembly*, above.

There is nothing in the United States Constitution which affects the right of the people of this State to adopt any state constitutional or statutory provision they desire which restricts or inhibits, in whole or in part, the authority of Boards of Education, or other political subdivision governmental bodies, to levy taxes and incur indebtedness and to limit the same. There is no United States Constitutional provision prohibiting the authorizing of bond issues and tax levies of a state by some other method of approval than the submission to a vote of the electorate.

But *if the people of the State retain unto themselves through their State Constitution the final authority to determine by an election whether or not taxes should be*

levied or indebtedness incurred, then the expressed and implied *equal vote weighting* of the "one person, one vote" *principle* developed in the apportionment and districting cases *must apply to that election* as in the submission of the choice of competing candidates for public office; and *when a proposition is submitted to the vote of the electorate, each vote must be weighted the same regardless as to whether it is voted "NO" or "YES".*

In many states and their subdivisions bond issues and tax levies are decided upon by state or local legislative or administrative bodies and such procedures do not conflict with the Equal Protection Clause provisions of the United States Constitution. [The recent review "Judicial Activism and Municipal Bonds: Killing Two-Thirds with One Stone?" by J. H. Mershon, 56 Virginia Law Review 295, 331 (1970), tabulates the requirements for the issuance of bonds by the authorities of the several states.]

A three-judge United States District Court of the Fourth Division of the District of Minnesota, in *Rimarcik v. Johansen,* 310 F. Supp. 61 (1970), states the general standards applicable to an extraordinary majority, at page 65:

> "[5] Our initial concern is to determine the standard we must apply in evaluating the classification made by § 2. In *Reynolds v. Sims,* 377 U. S. 533 (1964), the Supreme Court said, '(S)ince the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of a citizen to vote must be carefully and meticulously scrutinized.' Thus, when a state statute affects a citizen's fundamental right to vote, it is not afforded the deference usually given to the judgment of state legislatures. See, *e. g., Kramer v. Union School District No. 15,* 395 U. S. 621, 627 (1969); *Cipriano v.*

City of Houma, 395 U. S. 701, 706 (1969); *Harper v. Virginia State Board of Elections,* 383 U. S. 663 (1966). The test is not whether there is a 'rational basis' for the distinctions made, but rather whether the distinctions are necessary to promote a compelling state interest. *Kramer v. Union School District No. 15, supra* at 627-628. This exacting standard applies not only to cases in which a state statute denies the franchise, e. g., *Kramer,* but also to cases in which a state statute dilutes or debases a vote. As stated by the Court in *Reynolds v. Sims, supra* at 555, '(T)he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.' "

The District Court continues (on pages 67 and 68) and applies the standards to the issue of the unconstitutionality of the requirement of an affirmative vote in excess of a simple majority.

"[8] We view the underlying policy of the one man, one vote cases as establishing a basic constitutional principle—equality among voters.[7]

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[7] As stated by Justice Douglas in his dissenting opinion in *South v. Peters,* 339 U. S. 276, 279 (1949), cited by the Court in *Reynolds v. Sims,* 377 U. S. 533, 555, n. 29:

> "There is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth. The right to vote includes the right to have the ballot counted. . . . It also includes the right to have the vote counted at full value without dilution or discount. . . . That federally protected right suffers substantial dilution . . . (where a) favored group has full voting strength . . . (and) (t)he groups not in favor have their votes discounted."

Insofar as that principle is concerned, the one man, one vote cases are not substantially distinguishable

from the case at bar. Each case of course must be decided on its own merits. Plaintiff's claim presents us with two issues: First, whether § 2 does in fact discriminate against a class of voters; and second, if it does, is such discrimination violative of the Equal Protection Clause. We believe the one man, one vote cases do provide us with substantive guidelines under the concept of equal protection to be applied in the resolution of these issues.[8]

With respect to the first issue, we believe that § 2 does discriminate against a class of voters; namely, those who vote 'Yes' on a proposed amendment. The efficacy of the 'Yes' vote is effectively diminished by the 55% voter approval requirement. The basis for the discrimination is that the statute, in granting the franchise in the manner it does, ascribes a value to the vote according to the voter's preference on the issue to be decided in the election. It thereby grants those opposed to the amendment a disproportionate voice in the outcome of the election. The remaining issue we must determine, then, is whether the state in so granting the franchise has done it in such a manner as to violate the Equal Protection Clause.

[9] The command of the Fourteenth Amendment is that '(n)o state . . . shall deny to any person within its jurisdiction the equal protection of the laws.' The 'concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged.' *Reynolds v. Sims, supra,* at 565. Uniform treatment does not mean that a state may never distinguish between citizens. *Avery v. Midland County, supra,* at 484. *Carrington v. Rash,* 380 U. S. 89, 92 (1965). The Supreme Court has

stated that the test is whether the statute, by distinguishing between citizens, constitutes an invidious discrimination against those disadvantaged by the classification. *Avery v. Midland County, supra,* at 484; *Reynolds v. Sims, supra,* at 561. This test is to be made on the basis of all relevant factors, including, when the statute affects a fundamental right, whether the classification is necessary to promote a compelling state interest. *Kramer v. Union School District No. 15, supra.*

IV

No state interest is so compelling that it can override the individual citizen's right to an equally weighted vote in any instance in which a proposition affecting the health, welfare, or education of the citizen or his dependents is being submitted to a popular vote.

The right of a citizen to an equally weighted vote is as fundamental as the right to vote itself; and the right to vote is preservative of other basic civil and political rights.

The necessity of extraordinary majority voting requirements for promoting a "compelling state interest" is discussed in several recent cases. A careful distinction must be drawn between those instances in which a citizen's personal rights, such as the health, welfare, or education of the citizen or his dependents is involved in the proposition submitted to the electorate, as in *Rimarcik v. Johansen,* 310 F. Supp. 61 (1970); *Westbrook v. Mihaly,* Sup., 87 Cal. Reptr. 839 (1970), and those cases in which the state has an interest as in its governmental structure, such as the annexation of one subdivision of the state to another as in *Adams v. City of Colorado Springs,* 308 F. Supp. 1397 (1970), affirmed ... U. S. ..., 38 L. W. 3506, or the incorporation of unincorporated territory, as in

Clay v. Thornton, 169 S. E. 2d 617 (1969); dismissed, *Turner v. Clay*, 397 U. S. 39 (1970).

In the cases in which the citizen's personal rights were being determined, the decisions upheld the equality of the weighting of the vote of the individual citizen; in the cases involving the states interest in the territories of its subdivisions, extraordinary voting requirements were upheld.

The California Supreme Court in *Westbrook v. Mihaly*, Sup., 87 Cal. Rptr. 839 (1970), found that state's extraordinary two-thirds majority requirement (California Constitution, former Article XI, Section 18; present Article XIII, Section 40) for the adoption of propositions for school bonds or municipal bonds is not necessary for the attainment of any compelling state interest, neither under the present conditions of society nor under the present conditions of the greatly expanded protection afforded the right to vote. The Court, at page 847, said:

> "[8] . . . [T]he period in which section 18 was adopted was not greatly concerned about inequalities in the electoral process.[17]

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[17] Thirty years were still to elapse before the Seventeenth Amendment sanctioned popular election of United States Senators, and it would be forty years until the Nineteenth Amendment extended the franchise to women.

> For example, even though the Fifteenth Amendment, forbidding denial or abridgement of the right to vote on racial grounds, had been ratified only eight years earlier, most of the delegates to the Constitutional Convention believed that Californians of Chinese ancestry should not be permitted to vote and only grudgingly limited the exclusion to 'natives of China.' (Gaylord, 'History of the California Election Laws,' West's Election Code, p. 41.) Much water has gone under the bridge since the 1870's and we may not re-

solve this problem by applying the standards of that era. (See, e. g., Brown v. Board of Education, etc. (1954), 347 U. S. 483, 492, 74 S. Ct. 686, 98 L. Ed. 873.) 'Our understanding and conception of the rights guaranteed to the people by the "stately admonitio[n]" of the Fourteenth Amendment have deepened, and have resulted in a series of decisions, enriching the quality of our democracy, which certainly do not codify State's rights, governmental theories or conceptions of human liberties' as they existed in the Nineteenth Century. (Fn. omitted.) (Fortson v. Morris (1966), 385 U. S. 231, 247, 87 S. Ct. 446, 454, 17 L. Ed. 2d 330; Fortas, J. dissenting.) Our task is to decide whether 'the challenged provision is compatible with the demands of equal protection as they apply in contemporary society.' (Castro v. State of California (1970), 2 Cal. 3d 223, 231, 85 Cal. Rptr. 20, 25, 466 P. 2d 244, 249.) This means, since 'notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change' (Harper v. Virginia State Bd. of Elections (1966), 383 U. S. 663, 669, 86 S. Ct. 1079, 1083, 16 L. Ed. 2d 169), that the constitutionality of article XI, section 18 must be determined not only in light of the need for and effect of the provision under present conditions, but also in light of the greatly expanded protection we have afforded to the right to vote."

The California Supreme Court continues at page 859:

"Nor do we believe that the two-thirds requirement may be justified as a method of protecting real property owners from additional taxes necessary to service the higher level of bonded indebtedness which it is reasonable to assume would result were bonds to be issuable upon simple majority approval. We express no opinion as to whether or in what circumstances the state may structure its election laws to accommodate

the financial interests of property owners. Assuming, arguendo, this to be a legitimate state interest, *we do not believe that under contemporary conditions it is so compelling as to justify depriving petitioners of their right to a fully effective vote.*" (Emphasis supplied.)

Thus, as indicated in the foregoing cases, no state interest is so compelling that it can override the individual citizen's right to an equally weighted vote in any instance in which a proposition affecting the health, welfare, or education of the citizen or his dependents is being submitted to a popular vote.

CONCLUSION

The extraordinary majority voting requirements of the West Virginia constitution and statutes, which require a three-fifths voter majority for school bonds and school tax levies, have been held by the West Virginia Supreme Court of Appeals to be in violation of the provisions of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

The "Committee for the Equal Weighting of Votes" respectfully urges this Court to affirm the decision of the Supreme Court of Appeals of West Virginia.

Respectfully submitted

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 96

A. T. GORDON, ET AL., *Petitioners*,

v.

GRANVILLE H. LANCE, ET AL., *Respondents*.

On Writ of Certiorari to the Supreme Court of Appeals of West Virginia

BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION, AMICUS CURIAE IN SUPPORT OF POSITION OF RESPONDENTS

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BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION, AMICUS CURIAE IN SUPPORT OF POSITION OF RESPONDENTS

This brief is filed with the written consent of the parties, pursuant to Rule 42.2, Revised Rules of the Supreme Court of the United States. It supports and augments the Respondents' position asserting that the provisions of the West Virginia Constitution and

state statutes requiring an extraordinary majority unconstitutionally debases and dilutes the votes of Respondents in a referendum to approve the issuance of general obligation bonds and to authorize excess tax levies.

INTEREST OF NATIONAL SCHOOL BOARDS ASSOCIATION

The National School Boards Association is a nonprofit corporation organized under the laws of the State of Illinois for the purpose of working for the adequate and equitable financial support of the public schools and for other purposes which tend to improve public education in the United States (NSBA Constitution, Article II).

NSBA currently making its 30th year of service is a federation composed of (a) the membership of each of the fifty state school boards associations; (b) the direct affiliation of local school boards which are members of state associations; and (c) the affiliation of groups which presently include community college trustees, attorneys for school boards, and a special group of large city board members. In total the association represents approximately 84,000 school board members or trustees, who in turn, are responsible for the education of over 95 percent of the nation's public school children. It is these citizen leaders who must fiscally manage local budgets and raise monies for education through the taxing powers they possess.

Each year a Delegate Assembly determines association policy which is articulated in the form of Resolutions. With respect to the question presented in the present case, *Gordon* v. *Lance,* the 1970 Delegate Assembly adopted Resolution 4 which reads as follows:

RESOLUTION 4

State Laws Requiring More Than a 50 Percent Voter Approval on School Issues

The National School Boards Association believes that state referendum provisions requiring state school financing issues to be approved with the concurrence of an excess of a majority of the electorate, rather than majority vote, are unfair and inconsistent with the principle of democracy. Accordingly, the National School Boards Association advocates that state and local agencies take steps to bring about change in these laws—including court action, if that is necessary.

The Resolution takes specific issue with laws requiring a majority vote of the electorate in order to exemplify—not to limit—NSBA's total opposition to any type of legislation which, in effect, requires school issues to be approved by more than a majority of the actual voters.

At the time of this suit, NSBA is painfully aware that many of the school boards which it represents are suffering financial crises, to the detriment of public education, because of discriminatory laws which are similar to the one here at issue.

> . . . In the last five years voters of Senora, California have passed school bond issues by over sixty percent majority on three different occasions. The issues failed because of California's two-thirds voter approval requirement. As a result, children have had to attend school on a double session basis for three years.
>
> . . . In Danvers, Massachusetts in the spring of 1970, a $13.6 million school bond referendum received a majority vote but failed to achieve the necessary two-thirds vote. As a result of over-

> crowding, all special services for this fall school year have been cancelled. This includes all tutorial programs, remedial reading for the disadvantaged and many elementary school hot lunch programs.

Time and space does not permit a review of all school districts on which the extraordinary majority requirements are having a similar adverse effect. In this connection, reference should be made to a special finance study[1] completed this year which lists 14 states which have laws similar to the one here in question. Of the hundreds of school districts therein, we are aware that many others have faced financial crises in the past because of extraordinary majority laws and many others will in the future.

Accordingly, pursuant to the constitutional purpose of NSBA, the mandate of the NSBA Delegate Assembly, and the effect which extraordinary majority requirements have on the school districts which NSBA represents, we respectfully submit this brief *Amicus Curiae*.

SUMMARY OF ARGUMENT

As applied to a routine popular voting situation, on questions such as bond issues, with none of the special concerns which may surround approval of constitutional amendments, an extraordinary majority requirement is unconstitutional both under the equal protection of the laws clause and the due process of law clause of the Fourteenth Amendment.

Under the equal protection clause this Court has developed a "one man-one vote" doctrine, protecting

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[1] Barr, Financing Public Elementary and Secondary School Facilities in the United States 123-24 (June 1970).

voter participation in the political process, under which county unit systems of vote weighting, population inequality in legislative districts, and restrictions on the franchise in certain special purpose elections, have been declared unconstitutional. The extraordinary majority requirement likewise affects voter participation in the political process. Its operative effect is to block bond issues even if supported by a majority of those voters expressing a preference, unless the "yes" votes reach the specified percentage above a simple majority. Something in the nature of a minority veto power is thus created. Hence, extraordinary majority requirements are analogous in their operation and effect to the vote weighting which occurs in the voting systems recently invalidated in the "one man-one vote" cases, and are equally unconstitutional because in effect similar voters are accorded dissimilar political power.

However, Respondents recognize the reluctance of some courts and commentators to extend the equal protection theory of "one man-one vote" to extraordinary majority requirements,[2] in part because voter turnout in issue voting is typically very low, thus creating special popular consensus problems, and in part because of fears that the equal protection approach would get out of hand and invalidate every possible use of

[2] It is true that the equal protection clause approach does invite a simple one-to-one comparison of status and influence, and when the so-called stringent test of *Kramer* v. *Union Free School District*, 395 U.S. 621 (1969), and similar cases is added, a near insurmountable burden of proof passes to the state to justify any classification or distinction whatsoever. Under the test of *Kramer* and similar cases, once the right at issue is initially determined to be "fundamental," then any classification which limits that right violates equal protection unless the state can show a "compelling state interest."

extraordinary majority requirements, even in the constitutional amendment area.[3] There also are numerous provisions for extraordinary majorities in the operations of Congress and state legislatures.[4]

Respondents second ground for the unconstitutionality of extraordinary majority requirements is the due process clause of the Fourteenth Amendment, a ground of decision which would not be subject to the overreach fears which have been expressed by some concerning the equal protection argument. Under the due process clause governmental actions are unconstitutional if directed to an illegitimate end, and also are unconstitutional if the means used have no reasonable or rational relation to a legitimate end. Extraordinary majority requirements violate due process, because, even if a provision for effective voter review of policy proposals be permissible, and a concern for a broad consensus be legitimate, the extraordinary majority requirement creates an overcorrection against low voter turnout. In other words, if only a small fraction of voters vote on the issue, the extraordinary

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[3] Some states have required not only an extraordinary majority in the legislature to propose a state constitutional amendment, but also an extraordinary majority in the popular ratification process. For example, in New Mexico an extraordinary majority continues, although the added requirement that it exist also in each county has been invalidated. *State ex rel. Witt* v. *State Canvassing Board*, 78 N.M. 682, 437 P.2d 143 (1968).

[4] *United States Constitution:* Art. I, § 3 (conviction on impeachment); Art. I, § 5 (expulsion from Congress); Art. I, § 7 (overriding executive veto); Art. II, § 2 (ratification of treaties); and Art. V (constitutional amendment); *California Constitution* (partial): Art. IV, § 8 (d) (passage emergency legislation); Art. IV, §§ 10 (a) & (b) (overriding executive veto); Art. XI, § 2 (removal of county seat); *Michigan Constitution:* Art. 7, § 25 (purchases by state); *Nebraska Constitution:* Art. 5, § 2 (legislative acts to be declared unconstitutional by state Supreme Court).

majority may have some "consensus" creating effect; but if substantially all of the eligible voters vote on the issue, the requirement constitutes overcorrection and creates minority control of the political process.

ARGUMENT

I. REQUIRING AN EXTRAORDINARY MAJORITY FOR APPROVAL OF BONDS AND EXCESS TAX LEVIES VIOLATES THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION BY DEBASING AND DILUTING THE VOTE OF THE VOTER FAVORING THE PROPOSITION ON THE BALLOT.

The extraordinary majority requirements, which Respondents claim, and the Court below found to be repugnant to and therefore prohibited by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, are in Article X, §§ 1 and 8 of the West Virginia Constitution. These provisions, and the enabling legislation in support thereof, directed that tax levies and bond issues to be effective had to obtain the approval of at least sixty percent of the qualified voters in the first instance and three-fifths of all votes cast in the second. At a special election held in April, 1968, the Board of Education of Roane County, West Virginia, submitted propositions to the electorate to authorize the issuance of school improvement bonds and to levy taxes in excess of the maximum theretofore authorized.

These propositions were defeated, in that the requisite three-fifths majority approval was not obtained even though a simple favorable majority of 51.55 percent and 51.51 percent respectively was obtained. This challenge to the constitutionality of the extraordinary majority requirements ensued.

This Court has consistently upheld the right of suffrage as "a fundamental matter in a free and demo-

cratic society. . . . [and] since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds* v. *Sims,* 377 U.S. 533, 561-62 (1964). The franchise need not be granted by a state to the electorate on particular issues or matters of governmental policy, but once conferred "lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment", *Harper* v. *Virginia State Board of Elections,* 383 U.S. 663, 665 (1966), nor may classifications then be constructed which discriminate on the basis of race, wealth, geography, property ownership or military service. Some rational classifications, consistent with constitutional protections and a compelling state interest, may be delineated, but "once the class of voters is chosen and their qualifications specified, [this Court can] see no constitutional way by which equality of voting power may be evaded." *Gray* v. *Sanders,* 372 U.S. 368, 381 (1963).

It has been argued, that no classification of voters in fact exists in the instant case; see Brief of Hayes Smith, Amicus Curiae, in support of Petitioners, 15, and Comment, Extraordinary Majority Voting Requirements, 58 *Geo. L.J.* 411, 419 (1969); that these individual voters do not neatly fall into classes such as may be differentiated by residence location, property ownership or military service, all of which then would be protected by recent decisions of the Court. *Baker* v. *Carr,* 369 U.S. 186 (1962); *Cipriano* v. *Houma,* 395 U.S. 701 (1969); *Carrington* v. *Rash,* 380 U.S. 89 (1965). However, such a view ignores

the basic and invidious classifications based on the very thought processes of the individual voter on a particular issue. If it can be said that classifications to exclude the franchise based on mere physical differences such as race or wealth are constitutionally abhorrent to a free society, consider how much more dangerous to the very fabric of our democratic principles is a classification which debases the right of franchise or seeks to control the outcome of an election based on the ideas or opinions of the electorate, absent the demonstration of a compelling state interest. Once the lines of the issue before the electorate are drawn, and the individuals who plan to cast their ballots have made the necessary decisions pro and con, the two classifications have begun to take on an identity not entirely dissimilar to racial or property-owner classifications. But when at last the ballots have been cast the class composition finally is fixed, and each active voter can then identify with and consider himself a part of one of two classes—those favored or not favored by the weighting given his vote by the extraordinary majority requirement of the state statute or constitution. It is not sufficient to say that each voter may rely on the assurances that all constitutionally qualified electors may vote and that each individual's ballot will be *counted* equally with every other ballot—all being tallied as one each. The reason is that for a "yes" voter to reach true equality with the "no" voter, one out of every three "yes" ballots must be discarded as weightless when determining the extraordinary majority result. Equal protection to him becomes a meaningless pronouncement from on high.

This Court's rationale in *Gray* v. *Sanders, supra,* has a unique precedential status insofar as the extraordi-

nary majority requirement is concerned. Though the factual details of *Gray* do not identify precisely with those of *Lance,* a sufficient family resemblance exists to allow bed-sharing without a further introduction. In *Gray* an office was at stake—in *Lance* an issue; but both are single constituency cases. It has been said that "*Gray* was very close to being a simple 'right to vote' case and hence the true home of a 'one person, one vote' slogan. In a contest for a single office [or issue], why should not the front-runner in the popular vote win?" Dixon, *Democratic Representation* 177 (1968). And, it may be asked, why should not the front-runner win without the unequal handicap of a three-fifths majority requirement to overcome? This Court in *Gray* held that

> The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications. The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates [or issues], underlies many of our decisions . . . . The only weighting of votes sanctioned by the Constitution concerns matters of representation, such as the allocation of Senators . . . and the use of the electoral college. . . . 372 U.S. at 379-80.

It should be recognized that in a representative or single member district election some dilution of a person's vote is to be expected and accepted since people are not fungible Within any legislative district the winner-take-all rule operates and the minority takes nothing. But in a direct election for an office or an issue such dilution is not only unnecessary but unacceptable.

Dominant in Chief Justice Earl Warren's opinions in the 1964 *Reapportionment Decisions*

> is the ideal that as nearly as possible all men should count as one politically, however different their other circumstances. Such an idea has been one of the vital components of American political development. The broadening of the franchise is one basic level in an egalitarian political ideal. A second level concerns voting rules regarding the filling of elective office once the breadth of the franchise has been settled. Practically, if not logically, the ideal becomes associated here with a simple plurality principle inside a given constituency, because of the impossibility of getting unanimity and the likelihood that control of the many by the few could result from more complicated choice systems. This is all that was involved in . . . *Gray* v. *Sanders.* Dixon, *supra,* at 582-83.

Control of the many by the few has been the overriding result in the school, county, and city bond elections where an extraordinary majority requirement has been in effect across the nation. One recent study, in 1966-67, found that only 40.4 percent of the proposals were approved by the requisite two-thirds majority requirement, while 80.8 percent of them received more than a simple majority of favorable votes. Also, during a 10-13 year period, two studies of voting results in the Los Angeles and San Francisco urban areas indicated that about one-half of all the bond proposals were defeated, while at the same time virtually all received more than a simple majority. This is *not* equal protection![5] Public Affairs Report, Bulletin of the Institute of Governmental Studies, Vol. 10, No. 4, August 1969, University of California, Berkeley.

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[5] " 'One man-one vote' is the symbol really of an aspiration for fairness, for avoidance of complexity, for intelligibility in our representational process in a mass democracy—indeed, for a sense of meaningful membership in the *polis.*" Dixon, *supra,* at 587.

Those who fear that the extension of the one-man, one-vote concept may lead to intrusions on other extraordinary majority requirements in the legislative or judicial arenas if the Court below is upheld may have erected a straw man. Authority in West Virginia and elsewhere for impeachment of state Senators by two-thirds vote of the elected members, amendment of the state constitution by a two-thirds approving vote of both houses of the legislature with a subsequent statewide referendum, and expulsion of a legislator by two-thirds vote of the entire membership of that house, all point to a compelling state interest in those requirements, as well as a lack of any personal interest of the electorate to be protected through equality of vote weighting.

The individual interests of the voters in having an equal voice in the outcome of bond and tax elections in West Virginia, no matter what the voter's individual persuasion, are fundamental rights; and, without an overriding compelling state interest having been shown, are within the protection guaranteed by the Fourteenth Amendment to the Constitution of the United States.

II. THE EXTRAORDINARY MAJORITY REQUIREMENT FOR BOND ISSUES AND TAX INCREASES IS IN ANY EVENT VIOLATIVE OF THE DUE PROCESS OF LAW CLAUSE OF THE FOURTEENTH AMENDMENT, EVEN IF DIFFICULTIES BE DEEMED TO EXIST IN THE EQUAL PROTECTION ARGUMENT EXTENDING "ONE MAN-ONE VOTE" TO THIS AREA.

A. Alleged Infirmities in the Equal Protection Argument.

The issue posed by this appeal raises a broad, complex public law question transcending the personal or immediate interests of the parties. Respondents are aware of the difficulties which some commentators have seen in moving directly from the "one-man one-vote"

principle of the legislative reapportionment and redistricting cases[6] to a rule that extraordinary majority requirements for approval of bond issues, or certain tax increases, are *per se* unconstitutional. A similar difficulty has been perceived in resting such a rule on the authority of the recent franchise cases.[7] These difficulties are discussed at length in the very recent opinion of Federal District Judge Oliver in *Brenner* v. *School District of Kansas City, Missouri,* —— F. Supp. —— (1970), 39 U.S.L.W. 2122 (decided Aug. 14, 1970), explaining the decision of the three-judge court in upholding the constitutionality of the extraordinary majority requirement for bond issues in Missouri.[8]

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[6] *Kirkpatrick* v. *Preisler,* 394 U. S. 526 (1969); *Wells* v. *Rockefeller,* 394 U. S. 542 (1969); *Reynolds* v. *Sims,* 377 U. S. 533 (1964).

[7] *Kramer* v. *Union Free School Dist. No. 15,* 395 U. S. 621 (1969); *Cipriano* v. *City of Houma,* 395 U. S. 701 (1969); *City of Phoenix* v. *Kolodziejski,* 399 U. S. 204 (1970).

[8] The alleged difficulty in basing the unconstitutionality of extraordinary majority requirements on the reapportionment and redistricting cases is that these cases concern the issue of fairness and effectiveness of representation in legislative bodies elected from districts, and also involve candidate voting, not issue voting. In a system of district voting a large amount of "vote weighting," in the loose use of the term, occurs because within each district a winner-take-all rule operates. In *Reynolds* v. *Sims* and successor cases this Court has ruled that it is unconstitutional to magnify this inherent factor of vote weighting in district systems by adding the factor of unequal population among the districts. It is a large jump from *Reynolds* v. *Sims* to the present dispute whether, in issue voting in contrast to candidate voting, an extraordinary majority requirement may be supported by the considerations related to a desire to insure broad popular consensus in the face of low voter turnout, or other considerations.

The stated difficulty in basing the unconstitutionality of extraordinary majority requirements on the recent franchise cases (concerning limitations on the school electorate or on the municipal

Respondents submit that the argument presented in Part I of this brief, with its strong reliance on *Gray* v. *Sanders,* 372 U.S. 368 (1963), surmounts or avoids these difficulties. It also may be noted that the rather negative reception in the Law Reviews of the West Virginia Supreme Court's ruling in *Lance* seems to be based not so much on a desire to preserve every form of extraordinary majority requirement, as on a fear of possible overreach in extending recent equal protection theory in simplistic fashion without analysis of the interests involved. It has been suggested that various "policy justifications would seem to support the proposition that a standard more flexible than the mathematical exactitude of one man-one vote should be utilized in the case of extraordinary majority requirements."[9]

Whether or not these fears of overreach in equal protection analysis are valid, they do invite considera-

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bond electorate) is simply that no apparent franchise issue is posed by the present extraordinary majority requirement in issue voting by the *total* electorate. Rather, the quite different issue is raised of what rules are to be used in determining the outcome of the voting, bearing in mind that the expressed voter preference "yes" or "no" on the issue may range from a tiny fraction of the total eligible electorate to an absolute majority. In addition, the decision of this Court in *McDonald* v. *Board of Election Comm'rs,* 394 U. S. 802 (1969) may be a not inconsiderable obstacle because it might appear that the classification sustained there in regard to the franchise, under which absentee ballots were denied to those unable to post bail, was a more invidious discrimination than the adverse effect on the "yes" voters of a sixty percent majority requirement for approval of a bond issue.

See also, *Westbrook* v. *Mihaly,* 471 P. 2d 487 (Calif. 1970); *Bogert* v. *Kinzer,* 465 P. 2d 639 (Idaho 1970).

[9] Comment, "Extraordinary Majority Voting Requirements," 58 *Geo. L. J.* 411, 425 (1970). See also 70 *Col. L. Rev.* 486, 502-03 (1970); 56 *Va. L. Rev.* 295, 328-30 (1970); 83 *Harv. L. Rev.* 1911, 1923 (1970).

tion of possible alternative grounds for holding unconstitutional the extraordinary majority requirement in the form it takes in the *Lance* case. The obvious alternative is the due process clause of the Fourteenth Amendment, which is well-adapted to case by case scrutiny of state policy to ascertain whether it is rationally related to a legitimate state purpose.

B. The Extraordinary Majority Requirement at Issue in Lance Violates the Due Process Clause of the Fourteenth Amendment Because It Operates To Give a Minority the Power To Block Effectuation of Needed Public Action, as Well as To Safeguard Against Low Voter Turnout.

Older than equal protection concepts as an effective instrument for curbing excesses in state policy, and indeed overlapping equal protection arguments in many cases in which equal protection has been used,[10] is the due process concept that governmental ends must be legitimate, and the means used must be reasonably adapted to those ends. The due process inquiry is whether the challenged law has "a reasonable relation to a proper legislative purpose," and is "neither arbitrary nor discriminatory." *Nebbia v. New York,* 291 U.S. 502, 537 (1934). It is common knowledge that use of the due process clause to invalidate state economic legislation has virtually ceased, but this has not repealed the due process clause as a check on arbitrary state policy in non-economic fields. *Griswold* v. *Connecticut,* 381 U.S. 479 (1965).

In *Baker* v. *Carr,* 369 U.S. 186 (1962) itself, relief was sought by the plaintiffs both under the due process and equal protection of the law clauses of the Fourteenth Amendment. Although the due process ap-

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[10] *Skinner* v. *Oklahoma,* 316 U. S. 535 (1942).

proach dropped out in the ultimate disposition of the case, it is apparent that due process is a concurrently available rationale for many if not all of the "one man-one vote" legislative apportionment cases. In this field, minority process is not due process. Without going so far as to extract a flat requirement of majority rule in all instances, the proposition reasonably can be stated that a legislative representation election system is arbitrary and lacking in due process if it can be shown—as Mr. Justice Stewart phrased it in the Maryland reapportionment case—to operate "systematically to prevent ultimate effective majority rule." *Maryland Committee for Fair Representation* v. *Tawes,* 377 U.S. 656, 677 (1964). The proposition takes on added force in the light of the existence in the Constitution, Article IV, Section 4, of the clause directing the federal government to "guarantee to every state in this Union a republican form of government." In *Gray* v. *Sanders,* 372 U.S. 368 (1963), invalidating Georgia's county unit system of popular vote weighting in statewide (single constituency) elections, under which the second-runner could possibly defeat the front-runner, the Court appealed to developing American history to support the arbitrariness of such a system, even though the opinion was not rested squarely on due process grounds.

Speaking in *Gray* of the non-majoritarian aspects of our Constitutional beginnings, including the electoral college system of electing a President, Justice Douglas said:

> Passage of the Fifteenth, Seventeenth, and Nineteenth Amendments shows that this conception of political equality belongs to a bygone day, and should not be considered in determining what

the Equal Protection Clause of the Fourteenth Amendment requires in statewide elections.[11]

Turning now to the case before the Court, it can be demonstrated that the extraordinary majority requirement in *Lance* is so ill-adapted to achievement of legitimate state ends that it is too arbitrary to pass muster under the due process clause, even with the burden of proof resting, conventionally, on the plaintiff. At the same time, the constitutionality of alternative devices to ensure deliberation and an adequate expression of popular feeling in issue elections, in contrast to candidate elections, can be shown not to be put in question.

The practicalities of the matter are the essence in this case. As pointed out in many of the Amicus Briefs for Petitioners filed with this Court, and as elaborated in various Law Review comments, *supra,* extraordinary majority requirements have a long history in this country, are extremely numerous, and are supported by a variety of asserted public policy considerations. This material need not be repeated here.

Possibly relevant considerations which emerge are (1) the nature and breadth of the "consensus argument," i.e., that new undertakings in areas such as schools need broad popular support if they are to be carried through effectively, and that without an extraordinary majority requirement small percentages of the total electorate will irrevocably commit all to a long-term debt; (2) the effect of the extraordinary majority requirement on the operation of the legislative process, i.e., the possibility of "buck-passing" because of the division of responsibility which the ref-

[11] 372 U. S. at 377 n. 8.

erendum creates; (3) the extent to which extraordinary majority requirements do encourage or ensure fiscal responsibility in the light of alternative borrowing devices and financing arrangements which can be invoked without use of a popular referendum (the extraordinary majority requirement generally being required only for general obligation bonds); (4) the facts concerning voter turnout in bond referenda elections, i.e., over the years and on various kinds of proposals what percent of the total eligible electorate actually participate in such issue elections, is the participation far lower than in candidate elections, is the participation so low as to question whether there has been any effective view expressed unless an extraordinary majority is required, is it valid to assume that those who do not take part have no interest to be protected, do voter profiles indicate that there are differences between issue voters and candidate voters, etc.

There is not time, nor is the record adequate, to explore all of these possibly relevant considerations concerning the constitutional question now before the Court. On many of these questions adequate empirical data may not exist. Helpful and provocative in this connection is the report entitled "The Extraordinary Majority Requirement in California," Institute of Governmental Affairs, University of California at Davis, especially the papers therein by Donald G. Hagman, Alvin D. Sokolow, and Alan K. Browne.

However, a more simple formulation of the issue in due process terms is available, which demonstrates that the extraordinary majority requirement in *Lance,* and similar cases, is an arbitrary and unreasonable

restraint on the political process, not justified by the ends allegedly served.

First, whatever may be the desired rule regarding constitutional amendments, or laws which change the basic structure or procedure of government, there is no need for an extraordinary majority requirement regarding ordinary policy determinations of government relative to regulatory or service programs of one sort or another. Indeed, such a requirement is inconsistent with the basic concepts of a republican form of government, inhibits political democracy at its inception, and disables government from serving society and meeting new needs. If, for various reasons, certain kinds of policies are suspect, they should be flatly prohibited, or handled through the recognized process of constitutional provision and amendment.

Second, for purposes of this case, however, it may be conceded that it is reasonable for a state to wish to ensure that some kinds of programs such as local bond issues receive special voter attention, and be undertaken only with widespread voter support, *provided* a minority veto power is not created. A popular referendum is one way to achieve special voter attention, but must be used with some caution because of the serious problem of low voter turnout, and voter inattention to the issue questions on the ballot even by the voter who does go to the polls. For example, and this appears to be a common experience, in Missouri a study showed that in 29 special bond elections the vote cast averaged less than a third of those voting for governor. Missouri Public Expenditure Survey Staff Report, "Changing Requirement for Voting Bonds: A Decision to be Approached With Caution," 25 (1965), cited in *Brenner* v. *School District of*

Kansas City, Missouri, —— F. Supp. —— (1970), 39 U.S.L.W. 2122 (decided Aug. 14, 1970). The question is not voter review, but effective voter review.

Third, one way to provide for meaningful voter participation on issues thought to require special attention, without creating a minority veto power, is to require a simple majority but to change the "quorum" or base, e.g., to require a majority of the electors residing and entitled by law to vote within the area to be affected. This is the exact provision used in South Carolina regarding elections on the issue of incorporating new municipalities. The provision recently was held constitutional by the Supreme Court of South Carolina in the face of a "one man-one vote" attack, and this Court denied review for want of a substantial federal question. *Clay* v. *Thornton,* 169 S.E. 2d 617 (1969), appeal dismissed for want of a substantial federal question, sub nom. *Turner* v. *Clay,* 397 U.S. 39 (1970).

Fourth, a related way to provide for meaningful voter review, without creating a minority veto power, would be to require a "quorum", or voter base, less onerous than *all* qualified voters, but higher than a mere majority of those voting on the bond issue. Thus, legislatures might be able to develop a reasonable voting requirement that combines the majority vote principle with the electoral turnout.

Fifth, the use of an extraordinary majority requirement as in *Lance,* is not a constitutional way to achieve the purpose of effective voter review, without creating minority veto power. At one extreme, if we assume

a low voter turnout, a sixty percent majority requirement or even a two-thirds requirement at as in California, might still permit a small fraction of the total electorate to control the issue, as Missouri experience has shown. Survey Staff Report, *supra*. At the other extreme, if we assume a high voter turnout approaching the total electorate, the extraordinary majority requirement goes too far, and creates actual minority control of the voting process. In the former instance the extraordinary majority requirement may possibly be a helpful correction in the direction of ensuring a higher consensus, but in the latter instance it automatically creates an overcorrection. This overcorrection is analogous to the "built-in" inequity which this Court perceived when it invalidated the Missouri system of apportionment of trustees on junior college district boards of trustees. *Hadley* v. *Junior College District*, 397 U.S. 50 (1970). In due process terms, the across-the-board extraordinary majority requirement in *Lance* violates due process because it has no reasonable or rational relationship to the purpose of ensuring meaningful voter participation on certain kinds of issues, even if it be assumed that the latter end is valid.

CONCLUSION

For the reasons hereinabove set forth this Court should affirm the judgment of the Supreme Court of Appeals of West Virginia which held that the extraordinary majority requirements of Article X, Sections 1 and 8 of the Constitution of West Virginia, and the statutory provisions in support thereof, were in conflict with and violative of the Equal Protection

Clause of the Constitution of the United States and therefore unconstitutional and unenforceable.

Dated, Washington, D. C.

September 18, 1970

Respectfully submitted,

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MISCELLANEOUS

The Federalist, No. 22 7

No. 96

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

A. T. GORDON, ET AL.,
Petitioners,

vs.

GRANVILLE H. LANCE, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

BRIEF AMICUS CURIAE ON BEHALF OF THE MISSOURI STATE TEACHERS ASSOCIATION IN SUPPORT OF POSITION OF RESPONDENTS

INTEREST OF AMICUS CURIAE

The Missouri State Teachers Association appears as *amicus curiae* and files this brief accompanied by the written consent of all parties. The Association is a professional association composed of over 49,000 certified persons employed in the Missouri public schools. The members of the Association comprise over 90 percent of the certified employees of school districts in Missouri.

The interest of the Missouri State Teachers Association in this case can be simply stated. The Association is one of the plaintiffs in a case involving legal questions substantially identical to those involved here. The case, *Morgan et al.* v. *The School District of Kansas City, Missouri, et al.*, No. 17688-1, was filed in the United States District Court for the Western District of Missouri, Western Division, and contested the constitutionality of Section 26(b) of Article 6 and Sections 11(b) and 11(c) of Article 10 of the Missouri Constitution of 1945 and the implementing Missouri statutes. These provisions require that school bond issues and certain school tax levies be approved by vote of two-thirds of the qualified electors voting thereon. The *Morgan* case was consolidated with another case involving the same issues (*Brenner et al.* v. *The School District of Kansas City, Missouri, et al.*, No. 17660-1). On August 14, 1970, a three-judge court handed down an opinion and order denying the relief requested by plaintiffs. The Missouri State Teachers Association and a number of the other plaintiffs in that case are presently perfecting an appeal to this Court.

It is clear that the requirement of an extraordinary majority for approval of school bond issues and school tax levies has made it possible for a minority of the electorate in many instances to effectively destroy the desire of the majority for an adequately financed school system. This has occurred numerous times within the last few years in Missouri and has greatly handicapped the school districts in Missouri, creating one financial crisis after another. The Missouri State Teachers Association believes the requirements for extraordinary majority approval found in the West Virginia Statutes and Constitution, as well as Missouri's, violate the Equal Protection Clause of the Four-

teenth Amendment and the Association urges this Court to affirm the opinion of the Supreme Court of Appeals of the State of West Virginia.

ARGUMENT

I.

The three-fifths vote requirement of Article X, Section 8, of the Constitution of West Virginia and of Sections 4 and 14 of Article 1, Chapter 13, Code, 1931, as amended, and the 60 percent vote requirement of Article X, Section 1, of the Constitution of West Virginia and of Section 16 of Article 8, Chapter 11, Code, 1931, as amended, result in a dilution of the votes of that class of voters who cast their votes for a proposition as compared with the votes of those who voted against it.

Petitioners argue that in this case there has been no "weighting" or "dilution" of any voter's vote as compared with the vote of any other voter (Petitioners' Brief, page 8). The irrefutable fact is, however, that the 60 percent requirement results in each negative vote being given one and one-half times the force of an affirmative vote. It is conceded by Petitioners that "The right of equal participation in the election process is now established as a fundamental right." (Petitioners' Brief, page 8). The Petitioners then argue that this right does not include the right to win an election merely because one receives the most votes, citing the case of *Fortson* v. *Morris*, 385 U.S. 231 (1966). However, Petitioners overlook the fact that the majority in the *Fortson* case did not consider it to be a voting rights case. In Georgia if no candidate for Governor received a majority of the votes cast, the legislature then selected the Governor from among the two candidates who received the most votes. This the majority ruled was simply the use of an alternative method to select the Gov-

ernor and it did not dilute or debase the vote of any voter as compared with any other voter.

Such a situation does not exist in the case at bar. Here a single issue was submitted to the electorate and each voter was faced only with the choice of casting his vote either affirmatively or negatively. Since the result of the election was to be based on a comparison of the number of affirmative votes with the number of negative votes, any system which allows the side receiving a minority of votes to win the election inevitably results in a dilution of value of the votes of those voters who voted with the majority as compared with the votes of those who voted with the minority. Thus in elections conducted in the manner of the ones presently before the Court, the side obtaining the majority of votes must be declared the winner, not because of the political theory of majority rule but because the Equal Protection Clause of the Fourteenth Amendment requires "equality of voting power" among qualified voters. *Hadley* v. *Junior College District*, 397 U.S. 50 (1970).

Petitioners argue that the West Virginia Constitutional and statutory provisions in question do not result in class legislation. The argument is apparently based on the fact that individual members of the class cannot be determined prior to the election. In the case of *Westbrook* v. *Mihaly*, 87 Cal. Rptr. 839, 471 P.2d 487 (1970), decided by the California Supreme Court En Banc, this type of argument was met by pointing out that the statute they were considering created two classes of voters: those who favored and those who opposed bond issues. The court observed:

> "It is not essential that a classification appear in explicit terms on the face of the law. Nor is it neces-

sary that those who are allegedly disadvantaged by the classification either constitute a class which is 'objectively identifiable' prior to the election or that they share in common other characteristics, such as race, economic status or residence. It is sufficient that the class emerge from its inchoate state at the time of the election and that it be defined by the act of voting affirmatively on a bond issue proposition. The equal protection clause extends to the shared political interests of groups otherwise random and diverse." 87 Cal. Rptr. at 850.

The fact that a person who votes in the affirmative on one question may vote in the negative on the next and that the class may change from issue to issue is irrelevant. The voter is classified each time he votes and if he chooses to vote yes the value of his vote is diluted.

II.

The three-fifths vote requirement of Article X, Section 8, of the Constitution of West Virginia and of Sections 4 and 14 of Article 1, Chapter 13, Code, 1931, as amended, and the 60 percent vote requirement of Article X, Section 1, of the Constitution of West Virginia and Section 16, of Article 8, Chapter 11, Code, 1931, as amended, are not necessary to promote a compelling state interest.

Once it has been determined that the constitutional and statutory provisions in question have diluted the weight of some citizens' votes, they violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States unless they are necessary to promote a compelling state interest. In the case of *Kramer* v. *Union Free School District*, 395 U.S. 621 (1969), this Court pointed out that since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of that right must be subjected to careful and meticulous

scrutiny to determine whether such infringement was *necessary* to promote a *compelling* state interest. The test is a two-fold one, as is pointed out in footnote 14 to the Court's opinion in *Kramer*. This Court stated:

> "Of course, if the exclusions are necessary to promote the *articulated* state interest, we must then determine whether the interest promoted by limiting the franchise constitutes a *compelling* state interest." [Emphasis added.] 395 U.S. at 632.

In the case now before the Court, the Petitioners argue that the interest promoted is the prevention of burdensome indebtedness and excessive taxation. While it cannot be denied that a 60 percent requirement makes it more difficult to pass bond issues and tax levies than would the requirement of a simple majority, there is no logical reason to believe that 60 percent of the voters will act wisely after assuming that a mere majority will not.

The West Virginia Supreme Court of Appeals highlighted the fallacy of this argument when it pointed out:

> "We are unwilling to concede that a determination of issues such as those involved in this case cannot be safely entrusted to a majority of the voters." *Lance* v. *Board of Education of County of Roane*, 170 S.E.2d 783, 791 (W.Va. 1969).

A similar comment was made by the Supreme Court of California in the case of *Westbrook* v. *Mihaly*, *supra*, when it observed:

> "We consider it fanciful to argue, in the absence of any evidence, that a majority of this electorate, better educated and with access to far more sources of information than its counterpart of a century ago, is so incapable of mature judgment that it will bankrupt itself through indiscriminate borrowing." 87 Cal. Rptr. at 856, 857.

Such an argument becomes even less defensible when one considers that the true effect of these provisions is to place the finances of the West Virginia school system under the control of a minority. As Alexander Hamilton pointed out in "The Federalist" No. 22:

> ". . . To give a minority a negative upon the majority (which is always the case where more than a majority is requisite to a decision), is, in its tendency, to subject the sense of the greater number to that of the lesser . . . . The public business must, in some way or other, go forward. If a pertinacious minority can control the opinion of a majority, respecting the best mode of conducting it, the majority, in order that something may be done, must conform to the views of the minority; and thus the sense of the smaller number will overrule that of the greater . . . ."

Further, an alternative and constitutionally permissible means of securing the alleged state interest would involve the placing of absolute limitations on bond issues and tax levies. In fact, limitations of this nature now exist in West Virginia. Article X, Section 8, of the West Virginia Constitution limits the amount of indebtedness which may be incurred by a county, city, school district or municipal corporation. Article X, Section 1, not only limits the maximum rate which may be passed by a tax levy election, but also limits the period of time for which such an increase may continue. Since an alternate constitutional means of promoting the state interest is available, it cannot be shown that the extraordinary majority requirement is *necessary*.

Petitioners have made no effort to demonstrate that the state, county and statutory provisions in question are *necessary* to promote a compelling state interest. If conditions ever existed which would have justified such a requirement, they do not today. The California Supreme

Court presented a well-documented analysis in the case of *Westbrook* v. *Mihaly, supra,* which clearly shows that changed conditions in local government administration and in the bond market now provide safeguards against fiscal irresponsibility by local governments. This analysis is found in subpart A of Section III of the opinion.

Financial stability is, of course, an important state interest, but the only *compelling* state interest in this case is the maintenance of a decent school system. As then Chief Justice Warren said in *Brown* v. *Board of Education,* 347 U.S. 483 (1954):

> "Today, education is perhaps the most important function of state and local governments." 347 U.S. at 493.

III.

The three-fifths vote requirement of Article X, Section 8, of the Constitution of West Virginia and of Sections 4 and 14 of Article 1, Chapter 13, Code, 1931, as amended, and the 60 percent requirement of Article X, Section 1, of the Constitution of West Virginia and of Section 16, of Article 8, Chapter 11, Code, 1931, as amended, constitute per se violations of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Even if the extraordinary majority requirements were found to be necessary to promote a compelling state interest, they would still constitute a per se violation of the Equal Protection Clause of the Fourteenth Amendment. An analysis of this Court's opinions involving voting rights reveals that the cases generally fall into three categories. The first category involves cases where states or their subdivisions have attempted to deny certain persons the right to vote. These include the cases of *Carrington* v. *Rash,* 380 U.S. 89 (1965); *Kramer* v. *Union Free School District, supra,* and *Cipriano* v. *City of Houma,* 395 U.S. 701

(1969), and may generally be characterized as involving the setting of qualifications for voters. It has usually been conceded that reasonable requirements as to age, citizenship, residence and literacy, are valid.

The second category involves cases where the votes of qualified voters have been diluted by the effect of a state or its subdivisions' apportionment of geographic constituencies. These include the cases of *Reynolds* v. *Sims*, 377 U.S. 533 (1964); *Avery* v. *Midland County*, 390 U.S. 474 (1968); and *Hadley* v. *Junior College District, supra.* In these cases the court has rejected, as insufficient, all alleged state interests which would result in deviation from the concept of one man, one vote. The only deviation tolerated is that made necessary because it is admittedly not practicable to require exact mathematical equality in districts.

The third category involves cases where the vote of qualified voters within a single constituency is diluted by a state's constitutional or statutory provisions. This category is similar to the second in that it involves the dilution of the vote of certain qualified voters, but it differs from the second in that the weighting of votes occurs within a single constituency rather than between two different constituencies. *Gray* v. *Sanders*, 372 U.S. 368 (1963), is the only case in this category decided by this Court. However, the case at bar also clearly fits into this category. In these cases there is no problem involving the securing of exact mathematical precision. As Justice Stewart pointed out in his concurring opinion in *Gray*:

> "This case does not involve the validity of a State's apportionment of geographic constituencies from which representatives to the State's legislative assembly are chosen, nor any of the problems under the Equal Protection Clause which such litigation would present. We do not deal here with the 'basic ground

rules implementing *Baker* v. *Carr*.' This case, on the contrary, involves statewide elections of a United States Senator and of state executive and judicial officers responsible to a statewide constituency. Within a given constituency, there can be room for but a single constitutional rule—one voter, one vote." 372 U.S. at 381, 382.

The tests set out in *Kramer* v. *Union Free School District, supra,* need not be applied to the case at bar, for, as the Court stated in *Gray*:

"Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications." 372 U.S. at 379, 380.

In *Harper* v. *Virginia State Board of Elections,* 383 U.S. 663 (1966), the court held Virginia's poll tax unconstitutional. The court said:

"But we must remember that the interests of the State, when it comes to voting, is *limited* to the power to fix qualifications." [Emphasis added.] 383 U.S. at 668.

This Court, in the footnote to its opinion in the *Reynolds* case, quoted from Justice Douglas' dissent in *MacDougall* v. *Green,* 335 U.S. 281 (1948) (*Moore* v. *Ogilvie,* 394 U.S. 814 (1969), overruled the majority opinion in *MacDougall*), as follows:

" 'None would deny that a state law giving some citizens twice the vote of other citizens in either the

> primary or general election would lack that equality which the Fourteenth Amendment guarantees * * * The theme of the Constitution is equality among citizens in the exercise of their political rights. The notion that one group can be granted greater voting strength than another is hostile to our standards for popular representative government.'" 377 U.S. at 564

Yet what Justice Douglas referred to is exactly what has happened in the case at bar. Here, those voters who chose to cast their votes in the negative had those votes weighted one and one-half times the vote of those who voted in the affirmative. In deciding the case of *Hadley v. Junior College District, supra,* the court set out the principle which should be controlling here:

> "But once a state has decided to use the process of popular election and 'once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded.' Gray v. Sanders, 372 U.S. 368, 381 (1963)." 397 U.S. at 59.

The constitutional and statutory provisions here involved are designed to allow a minority to consistently frustrate the will of the majority. For this reason they violate the Equal Protection Clause of the Fourteenth Amendment.

IV.

Lower Federal and State Court opinions which have considered the constitutionality of extraordinary majority requirements.

In addition to the Supreme Court of Appeals of the State of West Virginia's decision in this case, there have been three other reported decisions which have considered the constitutionality of extraordinary majority requirements similar to the ones here involved. The Supreme

Court of California in *Westbrook* v. *Mihaly, supra,* struck down the two-thirds majority requirement for the passage of certain bond issues and tax levies.

In *Bogert* v. *Kinzer,* 465 P.2d 639 (1970), the Idaho Supreme Court reached the opposite result and upheld a provision of the State's Constitution requiring a two-thirds majority for the issuance of general obligation bonds.

In *Rimarcik* v. *Johansen,* 310 F. Supp. 61 (D. Minn. 1970), a three-judge Federal Court struck down as violative of the Equal Protection Clause, a Minnesota statute requiring 55 percent voter approval to adopt or amend a city charter provision governing liquor control laws.

In the *Bogert* case, the Idaho Supreme Court based its decision on the fact that the United States Constitution contains provisions requiring the approval of more than a simple majority vote in deciding certain questions. The Federal analogy argument has been examined and rejected by this Court. *Gray* v. *Sanders, supra, Reynolds* v. *Sims, supra.* In the *Reynolds* case, the rejection of the Federal analogy was based upon the fact that the United States Constitution was developed through a series of compromises among sovereign states, and it was therefore not relevant as a guide for what is required to comply with limitations placed on the individual states.

In the case of *Morgan et al.* v. *The School District of Kansas City, Missouri, et al., supra,* in which the Missouri State Teachers Association is a party, the three-judge court's opinion has not yet been published. The court in *Morgan* reached a decision directly opposite to that of the California Supreme Court in the *Westbrook* case and which was contrary to the rationale of the three-judge court in *Rimarcik.*

CONCLUSION

It is respectfully submitted that the three-fifths vote requirement of Article X, Section 8, of the Constitution of West Virginia and Sections 4 and 14 of Article 1, Chapter 13, Code, 1931, as amended, and the 60 percent vote requirement of Article X, Section 1, of the Constitution of West Virginia and of Section 16 of Article 8, Chapter 11, Code, 1931, as amended, are in conflict with and violative of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States. They are therefore unconstitutional, unenforceable and void. The opinion of the West Virginia Supreme Court of Appeals should be affirmed.

Respectfully submitted,

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No. 96

IN THE

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OCTOBER TERM, 1970

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On Writ of Certiorari to the Supreme Court of Appeals of the State of West Virginia

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Brief for the American Association of School Administrators and The Council of Chief State School Officers, Amici Curiae, Urging Affirmance

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IN THE

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OCTOBER TERM, 1970

No. 96

A. T. GORDON, ET AL., *Petitioners,*

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Brief for the American Association of School Administrators and The Council of Chief State School Officers, Amici Curiae, Urging Affirmance

INTEREST OF THE AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS AND THE COUNCIL OF CHIEF STATE SCHOOL OFFICERS

The American Association of School Administrators (AASA) is a voluntary, nation-wide organization of school administrators. Founded in 1865, AASA, has grown steadily until today its membership includes over 18,000 school administrators throughout the country. It is fair to say that a substantial majority of American children attend schools administered by AASA members.

The Council of Chief State School Officers (CCSSO) is an independent organization, founded in 1928, whose members comprise the chief state school officers in each

of the 50 states and the heads of education agencies in six territories.

AASA and CCSSO are dedicated to improving the quality, as well as the administration of our nation's elementary and secondary schools. The *sine qua non* to an improvement of our public schools is adequate funding. Among the more serious obstacles to the provision of adequate funding are the extraordinary majority provisions under attack in this case. These provisions require the affirmative vote of 60 percent or ⅔ or sometimes even higher percentages of voters to pass a school bond issue. The result is the annual loss of literally hundreds of millions of dollars which are badly needed by our public schools.[1]

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[1] Scott and Hamilton report that, "The evidence is conclusive on this point: the [extraordinary majority] requirement has a powerful negative effect on the outcome of local bond elections." Scott and Hamilton "Extraordinary Majority Voting Requirements v. Equal Representation: A Constitutional Challenge", 10 Public Affairs Report, No. 4 (Univ. of Calif., Institute of Governmental Studies, Berkeley, California, August 1969) p. 3. Scott and Hamilton continue:

> "We may draw several conclusions from the survey of bond election experience in California. First, the very high rates of simple majority approval suggest that the local councils and boards submitting the proposals have been remarkably in tune with their electorates. Second, it is the two-thirds requirement that is responsible for almost all of the defeats—and for the *appearance* of discord." [*id.* at 4. (emphasis in original)]

See also "Results and Trends in California School District Bond Elections: 1954-59" (California State Department of Education, Bureau of Educational Research, Sacramento, California, 1960), pp. 1-3; Starner, *General Obligation Bond Financing By Local Governments: A Survey Of State Controls* (Univ. of Calif., Bureau of Public Administration, Berkeley, California, 1961), pp. 76-83, 111-117; Marini, *Local Bond Elections in California: The Two-Thirds Majority Requirement* (Univ. of Calif., Institute of Governmental Studies, Berkeley, California, 1963), pp. 9, 30.

Since this Court's decisions striking down those provisions of state law which excluded non-freeholders from the franchise in bond elections,[2] it has become even more difficult to pass school bond issues. The previously excluded voters are, as a group, more likely to be apartment-dwellers and less likely to have children in the school system. For these reasons they are more likely to be "no" voters in a school bond election. While we recognize the sound principles on which these decisions are based, it would nevertheless be most unfortunate if this Court were to strike down provisions excluding a group which tends to be "no" voters, but at the same time permit the use of extraordinary majority provisions whose inevitable effect is to dilute "yes" votes.

Because we seek to preserve our public school system, because we believe that our public schools cannot be maintained unless they are improved and cannot be improved unless they are adequately funded, we urge this Court to rule, for the reasons presented below, that extraordinary majority provisions violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

INTRODUCTION AND SUMMARY OF ARGUMENT

Two streams of constitutional development provide the analytical framework for determining whether so-called extraordinary majority provisions violate the Equal Protection Clause. The first of these streams involves the development of equal protection theory generally and the evolution of the "compelling-interest" test as a standard of review for equal protection claims.

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[2] *Cipriano* v. *City of Houma*, 393 U.S. 701 (1969); *Phoenix* v. *Kolodziejski*, 399 U.S. 204 (1970).

This approach to the problem of extraordinary majority provisions requires the Court to ask whether the applicable standard of review is the compelling-interest test or the reasonable-basis test, and whether there is adequate legislative justification to meet the applicable test. The second stream of constitutional development against which extraordinary majority provisions may be measured involves more narrowly the voting rights cases, which include the reapportionment cases, the "fenced-out" cases, and others. Our brief analyzes the constitutionality of extraordinary majority provisions from both points of view.

In our first argument, we urge that the compelling-interest test is applicable, but that if the reasonable-basis test is applicable, the extraordinary majority provisions involved here do not meet even that test.

Extraordinary majority provisions violate even the reasonable-basis test, we argue, because the extraordinary majority requirement has no relationship whatever to the wisdom of the electoral decision. It is impossible to say in the abstract that it is wiser to decide "no" rather than "yes." Accordingly, there is no rational basis for weighing the outcome toward a "no" result. Even assuming that extraordinary majorities are required only with respect to issues of unusual importance, in any particular case a "no" decision may be the height of folly. Instead of insuring a wiser electoral decision, an extraordinary majority provision simply incorporates a principle of minority rule which is wholly antithetic to the democratic electoral process.

Moreover, the issues with respect to which extraordinary majorities are required in this case—the issuance

of local bonds and the increasing of local tax rates—are no more important than a host of other governmental decisions—including decisions not to issue bonds and not to raise tax rates.

Finally, the fact that a majority of the states find it unnecessary to require extraordinary majorities with respect to these issues strongly suggests that such provisions, where they exist, are certainly not required by a compelling state interest. Indeed, legal and market controls over the issuance of municipal bonds are readily available to insure a wise local determination as to their issuance *vel non*. These controls provide a far less restrictive alternative than tampering with the basic concept of majority rule in an election. When less drastic means are available, the constitution requires that they be chosen.

In our second argument, we consider the voting cases and whether the principles they contain require the Court to hold extraordinary majority provisions unconstitutional. In urging that they do, we give primary attention to the ways in which the defenders of extraordinary majority provisions seek to distinguish these cases. Among the principal attempts at distinction are: the argument that extraordinary majority provisions relate to the "election" of an issue rather than of a man to hold an office; the argument that such provisions provide for a reasonable representation of interests; the argument that a fairly chosen representative government has decreed that this is the way particular issues are to be decided; and the argument that extraordinary majority provisions regarding bond issues and tax rate elections are sanctioned, if only by analogy, by similar provisions required with respect to a variety of questions decided by federal and state legis-

latures. Each of these arguments, we believe, is repudiated by principles contained in the voting cases which we examine.

Finally, we also explore the special reasons why extraordinary majority provisions offend the electoral process by incorporating into governmental decision-making a principle of inaction, of preservation of the status quo, of resistance to change—and, in the final analysis, minority rule in the electoral process. For all of these reasons, we urge that the extraordinary majority provisions involved in this case should be invalidated.

ARGUMENT

I.

THE DILUTION OF "YES" VOTES EFFECTED BY THE EXTRAORDINARY MAJORITY PROVISIONS IN THIS CASE IS NOT SUPPORTED BY ANY COMPELLING GOVERNMENTAL INTEREST, AND INDEED LACKS EVEN A REASONABLE JUSTIFICATION.

A. The Compelling Interest Test Is the Applicable Standard of Review in Judging the Constitutionality of Extraordinary Majority Provisions.

In April, 1969, this Court elaborated the compelling interest test by which certain alleged violations of the Equal Protection Clause are reviewed. *Shapiro* v. *Thompson,* 394 U.S. 618 (1969). In certain kinds of cases, *Shapiro* held, the validity of a law would no longer be decided by reference to the more traditional standard of whether the law bore a reasonable relation to a legitimate governmental purpose.[8] Rather the

[8] The reasonable basis test has been described in a large number of cases. For example, in *Metropolitan Casualty Insurance Co.* v. *Brownell,* 294 U.S. 580, 584 (1934), the Court stated, "A statutory discrimination will not be set aside as the denial of equal protection

challenged law would "be judged by the stricter standard of whether it promotes a *compelling* state interest."[4]

In *McDonald* v. *Board of Election Commissioners*, 394 U.S. 809 (1969), decided a week after *Shapiro*, the Court described the kinds of cases to which the compelling interest is applicable. Specifically included were cases involving the right to vote, such as the re-

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of the laws if any state of facts reasonably may be conceived to justify it." See also *Gulf, C. & F.S.R. Co.* v. *Ellis*, 165 U.S. 150, 155 (1897) ("[Classification] must always rest upon some difference which bears a reasonable and just relation to the action in respect to which the classification is proposed and can never be made arbitrarily and without any such basis"); *McLaughlin* v. *Florida*, 379 U.S. 184, 191 (1964) ("Normally [the state's] judgment is given the benefit of every conceivable circumstance which might suffice to characterize the classification as reasonable rather than arbitrary and invidious"). In *McDonald* v. *Board of Election Commissioners*, 394 U.S. 802, 808, 809 (1969), the Court referred to "the more traditional standards" for evaluating "equal protection claims" as requiring the court to determine whether "a challenged statute" bears "some rational relationship to legitimate state end." Under this traditional test a statute "will be set aside if based on reasons totally unrelated to the pursuit of that goal."

[4] *Shapiro* v. *Thompson*, *supra*, 394 U.S. at 634 (emphasis in original). Earlier cases had adumbrated this higher standard of review. As early as 1944, the Court had ruled that certain legislative classifications such as race were "suspect" and therefore subject to a higher standard of justification when reviewed under the Equal Protection Clause. *Korematsu* v. *United States*, 323 U.S. 214, 216 (1944). See also *Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942); *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886). Since that time other cases have indicated that in certain circumstances a higher standard of justification is likewise required. See *Bates* v. *Little Rock*, 361 U.S. 516, 524, (1960); *NAACP* v. *Button*, 371 U.S. 415 (1963). Finally, in *Williams* v. *Rhodes*, 393 U.S. 23, 31 (1968), the Court held that Ohio's impediments to third political parties would be constitutional only if justified by a "compelling" state interest.

apportionment cases.[5] As Mr. Justice Marshall has written:

> If it was not clear in 1965 [after the reapportionment cases], it is clear now that once a State has determined that a decision is to be made by popular vote, it may exclude persons from the franchise only upon a showing of a *compelling* interest.[6]

It is clear that the dilution of a vote is tantamount to a partial denial of the right to vote,[7] and that the same high standard of review is therefore applicable. Indeed, this Court has stated that statutes which "may *dilute* the effectiveness of some citizens' votes receive close scrutiny from this Court."[8] In such cases, "the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a 'rational basis'

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[5] 394 U.S. at 809, citing *Reynolds* v. *Sims*, 377 U.S. 533 (1964) and *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663 (1966). The Court concluded that it was not necessary to apply the compelling interest test in the *McDonald* case because "there is nothing in the record to indicate that the Illinois statutory scheme has an impact on appellants ability to exercise the fundamental right to vote." (394 U.S. at 807).

[6] *Hall* v. *Beals*, 396 U.S. 45, 52 (1967) (dissenting opinion) (emphasis supplied). The majority opinion, based on grounds of mootness, did not disagree with Mr. Justice Marshall's assessment in the quoted passage.

[7] "The right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the exercise of the franchise." *Reynolds* v. *Sims*, 377 U.S. 533, 555 (1964).

[8] *Kramer* v. *Union Free School District*, 395 U.S. 621, 626 (1969) (emphasis in original), citing *Reynolds* v. *Sims*, 377 U.S. 533 (1964).

for the distinctions made are not applicable."[9] In a word therefore, the compelling interest test is applicable to dilution cases. Accordingly, there can be no doubt that the compelling interest test is applicable to distinctions made between "yes" voters and "no" voters in this case.[10]

It may be well at this point to dispose of petitioners *in limine* argument that there has been no dilution here, that indeed no distinction whatever has been made between "yes" and "no" votes. In the words of Judge Haymond's dissent in the Court below:

> Each voter in that election cast one vote and each vote so cast was counted as one vote for one voter [App. 59a].

This same argument could have been made in all of the reapportionment cases. It has been uniformly rejected. It is the effect that is determinative, not the formalistic fact that each person is permitted to place a single ballot in the ballot box. Where the effect is weighted voting, the result is condemned. The inquiry does not stop with whether, in a formal sense, one man is entitled to cast one vote.

In an extraordinary majority election, there is an obvious dilution of "yes" votes. In the case at bar, involving a 60% requirement, the voters are divided into classes of "yes" voters and "no" voters. A "yes" voter's vote is worth precisely two-thirds of

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[9] *Id.* at 627, 628.

[10] That this same high standard of review is applicable even though a bond election is involved is clear from *Cipriano* v. *City of Houma*, 395 U.S. 701 (1969) and *Phoenix* v. *Kolodziejski*, 399 U.S. 204 (1970), both of which applied the compelling interest test to bond elections, the first to revenue bonds and the second to general obligation bonds.

what a "no" voter's vote is worth. Petitioners' argue that there is no distinction or discrimination in this instance because the members of the class are not known ahead of time and a person who is in one class in this election may not be in the same class in the next election (Pet. Br. 9). This may or may not be a reason to justify the extraordinary majority provision, but it clearly does not alter the fact that a distinction exists between "yes" voters and "no" voters. They are in fact treated differently. The "yes" vote is plainly diluted. At a later time we shall examine whether the distinction is permissible under the Equal Protection Clause. Suffice it to say here, however, that the question cannot be avoided simply by saying that no distinction exists or that no dilution has occurred. Moreover, this Court has already held that, " 'fencing out' from the franchise a section of the population because of the way it *may* vote is constitutionally impermissible." [11] If a citizen may not be *excluded* from voting because of the way he *may* vote, surely his vote may not be *diluted* because of the way he *in fact* votes. If the Equal Protection Clause applies to the one, it must apply to the other.[12] As the Supreme Court of California has stated, "The Equal Protection Clause extends to the shared political interests of groups otherwise random and diverse." [13]

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[11] *Carrington* v. *Rash*, 380 U.S. 89, 94 (1965) (emphasis supplied).

[12] See *Williams* v. *Rhodes*, 393 U.S. 23 (1968), which, on the basis of the Equal Protection Clause, struck down Ohio's impediments to third political parties.

[13] *Westbrook* v. *Mihaley*, — Cal. 2d — (decided June 30, 1970), Slip Op. 23. Judge Sullivan's opinion is clearly the finest statement yet written on the constitutionality of extraordinary majority provisions.

A distinction having been drawn by giving a different effect to "yes" votes, than to "no" votes, we see no way of avoiding the application of the compelling interest test to determine whether the particular distinction is constitutionally permissible.

B. No Reasonable Basis, Let Alone a Compelling Governmental Interest, Can Be Found To Justify the Requirement of an Extraordinary Majority With Respect to the Issues Involved in This Case.

1. Extraordinary Majority Provisions Bear No Reasonable Relationship to the Wisdom of the Electoral Decision.

The principal reason advanced to justify the particular extraordinary majority provisions under review here is that the questions decided pursuant thereto are more important and more significant than other decisions of government. Whether or not this is true—and we contend and shall show below that it is not—,the threshhold issue is whether it makes a difference for equal protection purposes, even if such issues *are* more important. In other words, even assuming that the questions decided by extraordinary majorities here *are* more important than many other questions, does this alone justify requiring an extraordlinary majority for passage? We think not.

Simply that a decision is important does not *ipso facto* mean that it should be decided by an extraordinary majority. The other side of the coin in any extraordinary majority election is that the same important question of public policy may be decided by an electoral minority. Indeed, that is the crux of the objection to extraordinary majority provisions: not that there is rule by an extraordinary majority, but that there is rule by an electoral minority.

We have no doubt that whether municipal bonds are issued or whether taxes are raised are important ques-

tions. We do question that the decision to issue the bonds or to raise the taxes should be determined by a minority—for that is the inevitable effect of extraordinary majority provisions. In a word, extraordinary majority provisions subvert majority rule in an election. "The exercise of rights so vital to the maintenance of democratic institutions" [14] "cannot constitutionally be obliterated because of a fear of the political views" [15] held by a majority of the voters.

There is absolutely no relationship between the extraordinary majority device and the wisdom of an electoral decision, even assuming that the issue to be decided by the election is very important. No one can say in the abstract that it is wiser in a particular instance *not* to authorize, rather than to authorize, the issuance of bonds. Nor can one say in the abstract that it is wiser *not* to raise tax rates rather than to raise them. In any particular situation, it may be the height of folly not to act rather than to act. Yet the extraordinary majority provisions apply across the board, and the requirement must be met even though the bond issue in question represents the first and only long-term debt of the local jurisdiction.

There are devices by which to insure a wiser decision by the electorate—proper publicity, public hearings, access to channels of communications—,but the extraordinary majority provision is not one of them. Indeed, it is wholly unrelated to whether the electoral decision is wise. It would make as much sense to provide that whether a new school is to be built will be decided by the affirmative vote of only one-third or 10% of those voting.

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[14] *Schneider* v. *New Jersey*, 308 U.S. 147, 161 (1939).

[15] *Carrington* v. *Rash*, 380 U.S. 89, 94 (1965).

2. The Questions Required To Be Decided by Extraordinary Majority Provisions in This Case Are No More Important Than a Host of Other Governmental Decisions.

Turning now to the alleged reasons why the questions decided by extraordinary majorities here are more important than other governmental decisions, there are two reasons urged with respect to the issuance of bonds. The principal reason appears to be that the issuance of bonds "will bind all the people for long future periods." [16] The defenders of extraordinary majority provisions argue that "Unlike most legislative action, a decision to incur long-term bonded indebtedness is irreversible. Even if the bonds subsequently turn out to have been ill conceived, they cannot be amended and repealed." [17]

Our answer to this argument is that it proves too much: The same considerations are applicable not only to the incurring of long-term debt, but also too much other legislation. Decisions to lay down or not to lay down highways, to zone or not to zone for highrise apartments, to build or not to build schools—all mortgage the future in one direction or the other.[18] Like it

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[16] Brief of *amicus curiae*, California Taxpayers' Association in Support of Petitioners, p. 15.

[17] *Id.* at 3.

[18] Because a decision to incur bonded indebtedness or to raise taxes is no different from a myriad of other decisions which may be passed by a majority of the electorate or their representatives in the legislature, it may well be that requiring an extraordinary majority for these questions alone raises a serious independent infirmity under the Equal Protection Clause because of underinclusion. "Such underinclusiveness manifests a 'prima-facie violation of the equal protection requirement of reasonable classification.'" *Dandridge* v. *Williams*, 397 U.S. 471, 519 (1970) (Mr. Justice Marshall, dissenting). See also *Skinner* v. *Oklahoma*, 315 U.S. 535 (1942), and Tussman and tenBroek, "The Equal Protection of the Laws," 37 Cal. L. Rev. 341 (1949).

or not, the kind of society we and our children will be living in twenty years hence will depend on the decisions government and the electorate make in the meantime, not only with respect to bonded indebtedness, but with respect to a myriad of other issues as well. Certainly in this total equation the issuance of bonded indebtedness is not a substantial factor. Indeed, the very decision *not* to incur bonded indebtedness is doubtless of greater significance for the future—in terms of such matters as poorly educated children coming out of our public schools, and polluted waterways left by inadequate sewer systems—than the burden on future taxpayers were this indebtedness to be incurred. In short, a decision to incur bonded indebtedness is of no greater significance than an army of other decisions which government must make—including a decision not to issue the bonds. There is no special reason which justifies, let alone compels, treating a decision to incur bonded indebtedness differently from other governmental decisions.

The second reason advanced to justify extraordinary majority provisions with respect to the issuance of bonded indebtedness is that these provisions somehow encourage "sound fiscal policy" or "sound fiscal control." If this means anything other than the fact that the issuance of municipal bonds will bind future taxpayers (an argument we have already disposed of), it means that the improvident issuance of bonds can lead to financial catastrophe and the fiscal collapse of the issuing jurisdiction under the crushing burden of excessive debt. *How* an extraordinary majority provision or *what* extraordinary majority—60 percent, ⅔, 75 percent—is likely to prevent such improvidence is not clear.

What is clear, however, is that modern procedures for issuing municipal bonds—including the use of sophisticated consulting firms, specialized legal counsel, and careful issue-evaluation by respected national rating agencies—provide the real impediment to the profligate issuance of bonded indebtedness.[18a] Moreover, as the Supreme Court of California has noted:

> Bonds which might jeopardize a community's financial stability would be unlikely to find a purchaser. Municipal bonds are valued by investors not because of their speculative possibilities but because of their great security and the favorable federal tax treatment accorded them under 26 U.S.C.A. section 103. In addition, bond purchasers are unusually sophisticated; in 1964 over 60 percent of all bondholders were institutional investors such as commercial banks and insurance companies. (Investment Bankers Association of America, ***Fundamentals of Municipal Bonds*** (4th ed. 1965), p. 21).[19]

This Court has stated that distinctions under attack pursuant to the Equal Protection Clause may not be justified by dangers which are only "theoretically imaginable."[20] In truth, the danger of financial ruin which is said to require an extraordinary majority for the issuance of municipal bonds is, if not fanciful, only "theoretically imaginable" at best. That these fears and dangers are not matters of real substance is emphasized by the fact that most states find it unnecessary

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[18a] See Scott and Hamilton, "Extraordinary Majority Voting Requirements v. Equal Representation: A Constitutional Challenge," 10 Public Affairs Report No. 4 (Univ. of Calif., Institute of Governmental Studies, August 1969), p. 2.

[19] *Westbrook* v. *Mihaley*, — Cal. 2d — (decided June 30, 1970) Slip Op. 38, n. 44.

[20] *Williams* v. *Rhodes*, 393 U.S. 23, 33 (1968).

to condition the issuance of municipal bonds on approval by an extraordinary majority. Although most states do require some form of mandatory referendum as a condition precedent to incurring local bonded debt, the most common provision is for a simple majority.[21] Moreover, there is no evidence or suggestion that local jurisdictions in these states are on the brink of financial ruin.

Furthermore, any state that wishes to assure itself that no local jurisdiction will profligately incur bonded indebtedness may easily write into law requirements to assure that such indebtedness is incurred only when appropriate conditions are met. For example, state law may permit the issuance of local bonds only up to an amount computed pursuant to a properly balanced formula and only when appropriate provisions for repayment are made.[22] These are requirements that rationally relate to a wise decision. An extraordinary majority provision has no such relationship. When a less restrictive alternative is so readily available, it must be chosen.[23] This principle has already been ap-

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[21] Note, "Judicial Activism and Municipal Bonds," 56 Va. L. Rev. 295, 296, 331-334 (1970). A survey of state laws may be found in Starner, *General Obligation Bond Financing By Local Governments: A Survey of State Controls* (Univ. of Calif., Bureau of Public Administration, Berkeley, California, 1961), pp. 22-72, and Appendix A, p. 87.

[22] Starner, *loc. cit., supra,* n. 21, pp. 8-10; *Model Municipal General Obligation Bond Law* §§ 401-404, (National Municipal League, (1970).

[23] See *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960), ("Even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can more narrowly be achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.")

plied in voter exclusion cases, *Carrington* v. *Rash*, 380 U.S. 89, 94-96 (1965); *Kramer* v. *Union Free School District*, 395 U.S. 621, 632-633 (1969).[24] Whatever objectives West Virginia seeks to accomplish by extraordinary majority provisions can be secured "by means more finely tailored to achieved the desired goal,"[25] and this fact only emphasizes the unconstitutionality of the approach West Virginia has chosen.

Finally, it should be noted that we have been considering justifications only for extraordinary majority requirements with respect to bonded indebtedness. Also involved in this case is an extraordinary majority provision relating to increases in the tax rate. We have been unable to find any suggestion as to why this issue is of such unusual importance as even colorably to justify the requirement of an extraordinary majority. There appears to be no reason why a minority of the voters should be able to determine that the tax rate for a local taxing unit shall be X% rather than Y%.

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[24] See also *Turner* v. *Fouche*, 396 U.S. 346, 364 (1970); *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663, 670 (1966); *cf. Baldwin* v. *Seelig*, 294 U.S. 511, 521-22 (1934); *Mullane* v. *Central Hanover Trust Company*, 339 U.S. 306 (1950).

[25] *Turner* v. *Fouche*, 396 U.S. 346, 364 (1970).

II.

THE PRINCIPLES ENUNCIATED IN RECENT CASES PROTECTING THE RIGHT TO VOTE FROM IMPAIRMENT OR DILUTION EXTEND TO THE CASE AT BAR.

In a long series of recent cases, this Court has shown a special solicitude for that basic instrument of democracy—the vote. In the reapportionment cases,[26] the so-called fenced-out cases[27] and in a variety of other contexts,[28] this Court has steadfastly guarded the purity of the electoral process.[29] In so doing, it has deepened and enriched the quality of our democracy. "The consistent theme of those decisions is that the right to vote in an election is protected by the United States Constitution against dilution or debasement."[30]

We must recognize at the outset that none of these decisions is dispositive of or directly controlling in the case at bar. The question for this Court is whether the

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[26] *Baker* v. *Carr*, 369 U.S. 186 (1962); *Wesberry* v. *Sanders*, 376 U.S. 1 (1964); *Gray* v. *Sanders*, 376 U.S. 1 (1963); *Reynolds* v. *Sims*, 377 U.S. 533 (1964); *WMCA* v. *Lomenzo*, 377 U.S. 633 (1964); *Maryland Committee* v. *Tawes*, 377 U.S. 656 (1964); *Davis* v. *Mann*, 377 U.S. 678 (1964); *Roman* v. *Sincock*, 377 U.S. 695 (1964); *Lucas* v. *Forty-Fourth General Assembly of State of Colorado*, 377 U.S. 713 (1964); *Avery* v. *Midland County*, 390 U.S. 474 (1968); *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969); *Wells* v. *Rockefeller*, 394 U.S. 542 (1969); *Hadley* v. *Junior College District*, 397 U.S. 50 (1970).

[27] *Carrington* v. *Rash*, 380 U.S. 89 (1965); *Kramer* v. *Union Free School District*, 393 U.S. 621 (1969); *Cipriano* v. *City of Houma*, 393 U.S. 701 (1969); *Hadley* v. *Junior College District*, 397 U.S. 50 (1970); *Phoenix* v. *Kolodziejski*, 399 U.S. 204 (1970).

[28] *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663 (1966); *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966); *Williams* v. *Rhodes*, 393 U.S. 23 (1968).

[29] "We deal here with matters close to the core of our constitutional system [,] 'the right . . . to choose,' *United States* v. *Classic*, 313 U.S. 299 (1940), that this Court has been so zealous to protect." *Carrington* v. *Rash*, 380 U.S. 89, 96 (1965).

[30] *Hadley* v. *Junior College District*, 397 U.S. 50, 54 (1970).

radiating principles which these cases contain extend to this case.

Perhaps the most effective way to answer this question is to dwell not on the positive principles enunciated in these cases—one man, one vote; the unconstitutionality of vote dilution or impairment; the heavy burden required to sustain voter exclusion; in short, the prohibition against extraneous weights on the electoral scales—but rather to focus on the distinctions between these cases and the case at bar. By concentrating on the distinctions, we can more easily direct our attention to the critical question of whether these distinctions should make a difference in the application to the case at bar of the general principles enunciated in the voting cases.

A. The Voting Cases Apply Despite the Fact That the Case at Bar Involves the "Election" of an Issue Rather Than a Man To Hold Office.

The obvious distinction between the case at bar and most of the cases we have cited is that, while the case at bar involves the "election" or passage of an issue, most of the cited cases involve the election of a man to hold office. The particular issues presented to the electorate in this case were the issuance of local bonds and an increase in the tax rate. However, the possibilities of issues which may be presented to the electorate are endless. For example, in another extraordinary majority case, the issue was whether a liquor store could be located in a particular area.[31] The first ques-

[31] *Rimarcik* v. *Johansen*, 310 F. Supp. 61 (D. Minn. 1970). In the *Rimarcik* case a three-judge federal court invalidated a Minnesota statute requiring a 55% favorable vote for an amendment of a city charter affecting established "liquor patrol limits" (areas in which the city has authority to grant on-sale and off-sale liquor licenses).

tion therefore is, does it make a difference in the applicability of the precedent we have cited that the question was whether a particular man was to be elected to office rather than whether a particular issue is to be approved? We think not.

There is no obvious reason why the rules against dilution of the vote should be inapplicable where the question is whether an issue should be passed, as opposed to whether a man should be elected to a particular office. Surely Negroes or non-freeholders could not be excluded from an election on issues.[32] Neither, we believe, could the rural vote be weighted more than the urban vote. *Gray* v. *Sanders,* 372 U.S. 368 (1968). Why then should this Court permit the dilution and impairment of "yes" votes? Indeed, this Court has already upheld the applicability of the Equal Protection Clause to municipal bond elections. *Cipriano* v. *City of Houma,* 395 U.S. 701 (1969); *Phoenix* v. *Kolodziejski,* 399 U.S. 204 (1970). In each of these cases, the Court struck down state laws denying the franchise to non-freeholders in bond elections.

B. The Voting Cases Rejected the Contention That Weighted Voting May Be Sustained if the Weighting Reflects a Reasonable Representation of Interests.

Next, we consider the argument that extraordinary majority provisions provide a reasonable representation of interests, and that this distinguishes the case at bar from the reapportionment cases where the question was the fair representation of people.

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[32] Cases relating to exclusion of Negroes: *Nixon* v. *Herndon,* 273 U.S. 536 (1927); *Nixon* v. *Condon,* 286 U.S. 73 (1932); *Smith* v. *Allwright,* 321 U.S. 649 (1944); *Terry* v. *Adams,* 345 U.S. 461 (1953). Cases relating to exclusion of non-freeholders: *Kramer* v. *Union Free School District,* 393 U.S. 621 (1969); *Cipriano* v. *City of Houma,* 393 U.S. 701 (1969); *Phoenix* v. *Kolodziejski,* 399 U.S. 204 (1970).

In our view, the reapportionment cases and *Gray* v. *Sanders,* 372 U.S. 368 (1963), reject the principle that representation of varying interests may justify weighted voting. At bottom, whoever is elected matters only because of the positions he will take on *issues;* the critical interest of the electorate in an officeholder lies in how he will vote on issues. The reapportionment cases, and *Gray* v. *Sanders,* 372 U.S. 368 (1963), reject the notion that an election may be fair and constitutional simply because *interests* are reasonably represented. Instead, this Court ruled that each man's vote was to count equally with every other vote, despite the fact that other schemes, such as Georgia's county unit system which was struck down in *Gray* v. *Sanders,* could produce a reasonable representation of interests. As the Court stated in *Reynolds* v. *Sims,* 377 U.S. 533, 579-580 (1964), "Neither history alone, *nor economic or other sorts of group interests,* are permissible factors in attempting to justify" vote dilution (emphasis supplied) See also *Davis* v. *Mann,* 377 U.S. 678, 692 (1964); *Kirkpatrick* v. *Preisler,* 394 U.S. 526, 533 (1969).

Let us suppose a hypothetical case in which a board of commissioners is specially elected to decide whether bonds should be issued or tax rates raised within its jurisdiction. Suppose further that knowing that the sparsely populated rural areas of the jurisdiction are more conservative in these matters, the legislature decided to give reasonable representation to this rural interest by granting two votes to each rural voter in the election of the commissioners. Surely this scheme is unconstitutional. A scheme in which the dilution of a man's vote is direct and depends on which way he votes on a particular issue, can be no less unconstitutional than a scheme which indirectly dilutes his vote

by giving it less weight when it is cast for a man who in turn votes on the same issue.

C. The Voting Cases Cannot Be Distinguished on the Ground That a Fairly Representative Government Has Decided That Extraordinary Majorities Will Be Required.

It is also argued that extraordinary majority provisions should be upheld because they are simply a reasonable way in which a representative government (namely a properly apportioned state legislature) has decided by what procedure the local jurisdiction will determine whether it will take certain action, i.e. by an extraordinary majority vote of the people. The method of deciding these questions, it is argued, can always be changed by the fairly elected representatives of the people or, in the case of a state constitutional provision, by amendment thereto.

This argument is answered by the cases which have held that the one man, one vote principle is applicable to malapportioned local government units, notwithstanding the fact that the local malapportionment had been decreed by a properly apportioned legislature with power to change the local malapportionment any time it wished. There, too, it was argued that since a fairly representative legislature had adopted a plan for the election of local officials which provided for the reasonable representation of varying interests, and since the people or the legislature were free to change this method of election, the plan was constitutionally valid. This argument was resoundingly rejected in *Avery* v. *Midland County*, 390 U.S. 474, 480-1 (1967).

> When the state delegates lawmaking power to local government and provides for the election of local officials from districts specified by statute, ordinance, or local charter, it must insure that

> those qualified to vote have the right to an equally effective voice in the election process . . . That the state legislature may itself be properly apportioned does not exempt subdivisions from the Fourteenth Amendment.

Also in *Avery* (at 390 U.S. 474, 481) this Court characterized its decision in *Lucas* v. *Colorado General Assembly*, 377 U.S. 713 (1964) as follows:

> Inequitable apportionment of local governing bodies offends the Constitution even if adopted by a properly apportioned legislature representing the majority of the State's citizens. The majority of a State—by constitutional provision, by referendum, or through accurately apportioned representatives—can no more place a minority in oversize districts without depriving that minority of equal protection of the laws than they can deprive the minority of the ballot altogether, or impose upon them a tax rate in excess of that to be paid by equally situated members of the majority. Government—National, State, and local—must grant to each citizen the equal protection of its laws, which includes an equal opportunity to influence the election of lawmakers, no matter how large the majority wishing to deprive other citizens of equal treatment or how small the minority who object to their mistreatment. *Lucas* v. *Colorado General Assembly*, 377 U.S. 713 (1964), stands as a square adjudication by this Court of these principles.

It is said that since the legislature can decide whether a bond issue is to be authorized, it can decide to reach that decision in any way it chooses, including the use of an extraordinary majority election. But it cannot be true that the legislature is wholly and completely free to determine how that decision will be reached. For example, the legislature cannot decide to reach

that decision by an election which excludes Negroes or non-freeholders;[33] nor can it do so by an unfairly weighted electoral process.[34] Moreover, the Court has held that the one man, one vote principle of the reapportionment cases apply to elections of college trustees whose offices could have been filled by appointment rather than by election, even though the Court had previously "held that where a State chooses to select members of an official body by appointment rather than election, and that choice does not itself offend the Constitution, the fact that each official does not 'represent' the same number of people does not deny those people equal protection of the laws."[35] Thus, "whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election . . ."[36]

This Court has specifically ruled that legislatures may not distribute their legislative power free of the constraints of the Fourteenth Amendment. Even the power of the people themselves is limited by these constitutional restraints:

> . . . [T]hat a State may distribute legislative power as it desires and that the people may retain for themselves the power over certain subjects may generally be true, but these principles furnish no justification for a legislative structure which other-

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[33] See cases cited in footnote 32, *supra*.

[34] *Gray* v. *Sanders*, 372 U.S. 368 (1963).

[35] *Hadley* v. *Junior College District*, 397 U.S. 50, 58 (1970), citing *Sailors* v. *Board of Education*, 387 U.S. 105 (1967).

[36] *Hadley* v. *Junior College District*, 397 U.S. 50, 56 (1970). See also *Avery* v. *Midland County*, 390 U.S. 474 (1968).

> wise would violate the Fourteenth Amendment. Nor does the implementation of this change through popular referendum immunize it. *Lucas* v. *Colorado General Assembly*, 377 U.S. 713, 736-737 (1964). The sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed.[37]

In short, once it is determined to decide a question by an election, that election must comport with the requirements of the Fourteenth Amendment and each voter must be given an equal opportunity to influence the decision. This requirement is not met if a voter's negative vote is weighted more heavily than another voter's affirmative vote. As this Court stated in *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663, 655 (1966), "Once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."

In addition, there are special reasons why an extraordinary majority provision offends the electoral process. It incorporates a principle of inaction, of preservation of the status quo, of resistance to change. The requirement itself depletes the energies of those progressive elements who seek to meet the changing needs of the future; the effort to produce change is not made because success is so difficult; even a majority cannot produce change.[38] Thus the legislature which enacts an extraordinary majority requirement for a local

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[37] *Hunter* v. *Erickson*, 393 U.S. 385, 392 (1969).

[38] It is interestiing to note that this Court's decisions striking down provisions of statutes excluding non-freeholders from voting in bond elections (*Cipriano* v. *City of Houma*, 393 U.S. 701 (1969); *Phoenix* v. *Kolodziejski*, 399 U.S. 204 (1970)) have made it more difficult to pass bond issues. The previously excluded voters are,

government says to the people of that local governmental unit that the majority no longer rule. In the final analysis, an extraordinary majority provision incorporates the provision of minority rule.

D. Extraordinary Majority Provisions Cannot Be Sustained by Analogy to Similar Provisions With Respect to Action by Federal and State Legislatures.

The final argument by which extraordinary majority provisions are sought to be justified is that they are sanctioned by analogy to extraordinary majority provisions in state and federal legislatures.

This argument is easily met. The so-called federal analogy has already been rejected in *Gray* v. *Sanders*, 370 U.S. 368, 378 (1963). Moreover, provisions for extraordinary majorities in the case of legislative action relate, so far as we are aware, primarily, if not exclusively, to matters in which the legislature acts in a judicial or quasi-judicial capacity (such as impeachment proceedings), to matters in which the legislature approves action taken by another branch of government (such as the approval of a treaty), to matters relating to the balance of power between different branches of government (as in the extraordinary majority requirement to override an executive veto), or to internal operations of a legislative body (such as a two-thirds vote to dislodge bills from committee). That these questions involve different considerations is ob-

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as a group, more transient than freeholders and are therefore less likely to be in favor of the increased taxes required to service bonded indebtedness. We note this unhappy result despite the fact that we applaud the doctrinal soundness of these decisions. On the other hand, it would be unfortunate indeed if the Equal Protection clause were interpreted to forbid the exclusion of a group who tend to be "no" voters and yet permit the dilution of "yes" votes.

vious and quite apart from the fact that none of them involves an election by the people as does the instant case.

Moreover, it may be that certain issues crucial to the stability of government and generally relating to its organic structure [39] may be subject to change only upon the approval of more than 50 percent of the voters. However, the Court need not decide that question in this case, for certainly the question as to whether bonds should be issued or tax rates should be raised is not such an issue. As we have shown, there is nothing unusual about these issues, nor anything which differentiates them in any significant way from a multitude of other issues decided by local governments. In the absence of a demonstration of a compelling governmental interest in the extraordinary majority requirement, this requirement must fall.

E. The Cases on Which Petitioners Rely Are Inapposite.

It remains only to discuss the cases on which those who defend the constitutionality of extraordinary majority provisions rely.

Perhaps the principal case on which reliance is placed is *Fortson* v. *Morris,* 385 U.S. 231 (1966). In that case the Court sustained, 5-3, a Georgia law which provided that in the event no candidate for governor received a majority of votes, the Georgia legislature would choose the governor from the two candidates who received the highest number. The holding of the case is simply that the Constitution permits a state to select a governor by majority vote of the legislature when no candidate in the popular election receives a

[39] For example, a change from a bicameral to a unicameral legislature.

majority. Of course, in the election by the legislature only a majority, not an *extraordinary* majority, is needed to elect. Indeed, the *Fortson* case is not even a voting case. It is limited to the question of whether a state may choose its governor other than by election of the people. It is, we submit, impossible to find imbedded in this case a principle which can be said to apply to the case at bar. The best that can be argued for this case in support of petitioners' position is that if a plurality winner may be constitutionally rejected, an extraordinary majority may be constitutionally required. But this would be clearly misleading reasoning. To reject a decision of a plurality, but less than a majority, of the voters is one thing; to reject the decision of a majority as is often done by extraordinary majority provisions is quite another. Thus even giving the *Fortson* case its broadest reading, it does not extend to the case at bar.

The second case which is cited in support of extraordinary majority provisions is *Dusch* v. *Davis,* 387 U.S. 112 (1967), in which the Court sustained the constitutionality of a Virginia law requiring 7 of 11 city councilmen who were elected at large to nevertheless be residents of 7 different boroughs in the city, so that there would be at least one councilman from each borough. There was no malapportionment question in the case because all of the councilmen were elected by the votes of the entire city. The only question arose because the plan required the election of at least one candidate from each of the boroughs. Rejecting the constitutional attack on this statutory design, the Court stated:

> The present consolidation plan uses boroughs in the city "merely as the basis of residence for candidates, not for voting or representation." [Each

> councilman] is nonetheless the city's, not the borough's, councilman . . . . If a borough's resident on the council represented in fact only the borough, residence being only a front, different conclusions might follow [387 U.S. at 116].

The Court found that since each councilman's tenure is dependent upon a city-wide electorate, he would be vigilant to serve the interests of all the people in the city, not merely those in his home district. Thus, he would be in fact the city's and not the borough's councilman. Because of the differing characteristics of the boroughs, the Court found that, at least for a transition period, there was a compelling need for one councilman on the council with knowledge of each of the different borough's problems. The limits of this case are plain. It merely permits a state to provide for representation of different interests in its legislature by requiring a geographic dispersal of its legislators. However, it is clear that it does not permit malapportionment or weighted voting to be sustained on a "reasonable representation of interests" theory. *Gray* v. *Sanders,* 372 U.S. 368 (1963).

The final case on which those supporting extraordinary majority provisions rely is *Sailors* v. *Board of Education,* 387 U.S. 104 (1967). That case sustained a Michigan law providing for the appointment of the county school board by delegates from local school boards. The Court stated:

> We find no constitutional reason why state or local officers of the nonlegislative character involved here may not be chosen by the governor, by the legislature, or by some other appointive means rather than by an election . . .
>
> . . . .

> The Michigan system for selecting members of the county school board is basically appointive rather than elective . . .
>
> . . . .
>
> Since the choice of members of the county school board did not involve an election and since none was required for these nonlegislative officers, the principle of "one man, one vote" has no relevancy [387 U.S. at 108, 109, 111].

Clearly, this case has no application to the case at bar, which *does* involve an election. The limits of the *Sailors* decision were clearly delineated in discussion in *Hadley* v. *Junior College District,* 397 U.S. 50 (1970). The Court recognized in *Hadley* as it had held in *Sailors* that, a state may, if it wishes, appoint rather than elect, but "whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election" (397 U.S. at 56).

By the same token, a legislature may itself decide whether or not to issue local bonds, or it may delegate that decision to a local electorate, but if it is decided that that decision is to be made by the electorate in an election, then that election must comport with the Equal Protection Clause. As applied to such an election, we see no way of avoiding the conclusion that electoral decision must be made by a majority, rather than a minority, of those voting.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

Respectfully submitted,

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No. 96

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

A. T. GORDON, ET AL.,
Petitioners,

vs.

GRANVILLE H. LANCE, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

BRIEF FOR RESPONDENTS

OPINION BELOW

The opinion of the Supreme Court of Appeals of the State of West Virginia (A. 22a) is styled *Lance v. Board of Education* and is reported at 170 S.E.2d 783.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions to the decision of this case are the United States Constitution, Amendment XIV; West Virginia Constitution, Article X, Sections 1, 10 (which are set forth in respondents' Appendix, *infra* at 22) and 8 (which is set forth at A. 71a); West Virginia Code, ch. 11, art. 8, §16

(Michie 1966) and West Virginia Code, ch. 13, art. 1, §§4, 14 (Michie 1966) (the pertinent texts of which are set forth at A. 72-74).

QUESTION PRESENTED

Whether the 60% affirmative vote required by the Constitution and statutes of West Virginia for passage of local referendum questions of incurring bonded indebtedness or increasing tax levies for school improvements debases and dilutes all affirmative votes contrary to the equal protection guaranteed all voters by the Fourteenth Amendment?

STATEMENT OF THE CASE

Petitioners state that this case was presented for decision in both the Circuit Court and the Supreme Court of Appeals of West Virginia "on the pure question of law" of the validity of the sixty percent requirements for bond issues and excess levy elections under the pertinent provisions of the West Virginia Constitution and Code (Petitioners' Brief 5). This is not correct. Although there are no factual issues (defendants below admitted the factual allegations of the complaints) the facts pleaded are necessary and relevant to a decision in this case and were relied upon by the Supreme Court of Appeals in its opinion (A. 30a). They depict the frustrating experiences of the respondents and a majority of the voters of Roane County in their efforts to improve their schools and the education of their children.

Over the last twenty years the county educational system in Roane County has deteriorated until, in the school year 1967-1968, it ranked among the lowest in the state in the caliber of its professional staff and the level

of educational attainment of its children. Although not one of the more favored of the state's fifty-five counties, Roane County is near the average in income and resources available to support the educational efforts within the county. The failure of the county's educational efforts was due directly to its failure to furnish necessary revenues from within the county to support such efforts. Revenues available to the county from state and federal sources were well above the state average, but its current expenditures of $376.00 per pupil during the school year 1967-1968 ranked 49th among the State's 55 counties and was $243.00 behind the national average of $619.00 per pupil (Complaint in Civil Action No. 1063).

There have been no new schools or major additions or improvements to existing schools in Roane County since 1946. Since that time only minor improvements have been made to existing facilities, and the schools in the county have become old and inadequate. Many of the classrooms and other facilities are makeshift and all classrooms are overcrowded. Dangerous conditions exist in many of the structures; and at least two major schools within the county have serious fire hazards which have resulted in the State Fire Marshal and State Superintendent of Schools closing and prohibiting further use of the facilities until the conditions are eliminated. The estimated cost in 1968 to comply with the Fire Marshal's orders was $320,000. (Complaint in Civil Action No. 1062 and Exhibit A thereto).

During the years 1964-1968, the Board of Education and Superintendent of Schools of Roane County attempted to provide additional revenue for the county educational system by submitting to the voters of the county six different propositions, four involving the imposition of

additional levies and two requesting authority to issue bonds. (Annex B to Complaints in Civil Action Nos. 1062 and 1063). On each occasion the propositions submitted to the voters received more than a majority of the votes cast, but failed to attain the required sixty percent.

During the same period in 41 of 76 special elections held in West Virginia where excess levy or bond propositions were defeated, more than fifty percent of the votes cast were in the affirmative. Thus, the result in both Roane County and the State has been to thwart the will of the majority and to maintain minority control of the fiscal policies of the counties.

Respondents are citizens, taxpayers and qualified voters of Roane County. They have been active in support of efforts to provide additional local revenues for the county educational system, contributing their votes, effort and resources in the campaign for the passage of each of the additional levy and bond propositions submitted during 1964-1968. Upon the failure of the additional levy and bond propositions submitted to the voters on March 22, 1968, the Board of Education, at the insistence of respondents and other interested citizens and voters of Roane County, called for new elections to be held on April 29, 1968. These new elections are the subject matter of this action. The first election presented the question of the laying of additional levies in excess of the regular authorized levy for a period of five years, a part of the additional levy to be used for current expenses and a part for capital improvements. The second election presented the question of incurring debt and issuing general obligation bonds in the amount of $1,830,000, the proceeds to be used for capital improvements. In the additional levy election 2,866 votes, or

51.51% of the total number of votes cast, were cast for the laying of the additional levies. In the bond election 2,887 votes, or 51.55% of the total number of the votes cast, were cast for the issuance of the bonds. Again, more than a majority but less than sixty percent of the voters favored each of the propositions.

Following the canvass of the votes cast at the April 29, 1968 elections, respondents appeared before the Board on behalf of themselves and other persons voting with the majority on each of the propositions, and demanded that the Board proceed forthwith to authorize the laying of the additional levies and to issue the bonds as approved by a majority of the voters at the elections. Their demand was made on the ground that the sixty percent requirements of the State Constitution and Code are unconstitutional and invalid in that they deny to respondents and other similarly situated the equal protection of the laws accorded them by the Fourteenth Amendment of the Constitution of the United States and the Republican Form of Government guaranteed unto every State in Article IV, Section 4, of the Federal Constitution. The Board responded that it was ready and able to proceed with the issuance of the bonds and laying of the levies except for the sixty percent requirements.

Respondents filed these actions for declaratory judgments to determine the validity of the sixty percent requirements. The defendants below answered respondents' complaints admitting the facts pleaded but denying respondents' conclusions concerning the validity of the sixty percent requirements and the Board's authority to act upon favorable majority votes. The actions were consolidated for hearing and the Circuit Court, by order entered on November 22, 1968, ordered the complaints

dismissed and the actions stricken from the docket. Respondents then appealed the final order of the Circuit Court to the Supreme Court of Appeals of West Virginia.

On July 8, 1969, the Supreme Court of Appeals reversed the judgment of the Circuit Court and remanded the case for further proceedings consistent with the decision of the Court. In its opinion the Court held that the sixty percent vote requirements of the West Virginia Constitution and Code "are in conflict with and violative of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States and that, therefore, such provisions are void and unenforceable." (A. 39a). Having so found, the Court deemed it unnecessary "to decide whether the sixty percent vote requirements in question are violative of the Guaranty Clause of Article IV, Section 4 of the Constitution of the United States." (A. 39a).

When the decision of the Supreme Court of Appeals was announced, the defendants below, the Board of Education, its members, and the Superintendent of Schools of Roane County, resolved not to proceed further with the defense of the action. Thereupon the petitioners, as citizens, voters and taxpayers of Roane County, were permitted to intervene as additional parties defendant by the Supreme Court of Appeals and, thereafter, their motion for rehearing on the merits was denied.

SUMMARY OF ARGUMENT

The Equal Protection Clause guarantees equality within the qualified electorate in all voting cases; that each person's vote count as much as any other person's vote in terms of relative voting power. This guarantee extends to local, special-purpose elections involving ques-

tions of policy as well as elections involving competing candidates.

West Virginia requires a 60% affirmative vote for passage of local referendum questions of incurring bonded indebtedness or increased tax levies for school improvements. Such requirements constitute a State grant of 50% greater weight to the vote of each person opposing the raising of revenues for school improvements; two "no" votes have the same influence on the ultimate result as three "yes" votes. Thus, the votes of all persons voting in the affirmative are diluted and debased, contrary to the guarantee of the Equal Protection Clause.

There can be no State interest which will justify the dilution and debasement of a citizen's vote. Certainly the petitioners' loose and vague assertions concerning local fiscal irresponsibility do not necessitate a 60% affirmative vote requirement. The State has drawn the perimeter of fiscal responsibility in terms of the maximum amount of bonded indebtedness which can be incurred and the absolute maximum levy rate to which taxes can be increased and the maximum length of time any increased tax levy can be effective.

ARGUMENT

THE 60% AFFIRMATIVE VOTE REQUIRED BY THE CONSTITUTION AND STATUTES OF WEST VIRGINIA FOR PASSAGE OF LOCAL REFERENDUM QUESTIONS OF INCURRING BONDED INDEBTEDNESS OR INCREASING TAX LEVIES FOR SCHOOL IMPROVEMENTS DEBASES AND DILUTES ALL AFFIRMATIVE VOTES CONTRARY TO THE EQUAL PROTECTION GUARANTEED ALL VOTERS BY THE FOURTEENTH AMENDMENT.

A.

The Equal Protection Clause Protects The Votes Of Any Portion Of A Qualified Local Electorate From Debasement And Dilution.

It is required by the Constitution and statutes of West Virginia that in special elections to authorize political subdivisions to incur bonded indebtedness or increase tax levies for school improvements, 60% of the participating voters must favor such propositions before such indebtedness can be incurred or such tax levies can be increased. The issue presented in this case is whether this 60% affirmative vote requirement debases and dilutes the votes of those voters favoring the proposition.

This case, then, like *Gray* v. *Sanders*, 372 U. S. 368 (1963) does not present any question of voter qualification or exclusion of otherwise qualified voters from the electorate; nor does it present any question of apportionment or representation. It is a pure voting case presenting the question of whether a portion of the voters participating in an election were denied equal protection of the law by the application of the 60% requirements.

The right to vote is one of the most cherished and fundamental rights of citizens of this country. Being fundamental to a free and democratic society, it has always been scrupulously protected by this Court. *Reynolds* v. *Sims*, 377 U.S. 533 (1964). Without the free and unimpaired exercise of the right to vote, other of our basic rights become illusory. *Wesberry* v. *Sanders*, 376 U.S. 1 (1964).

The free and unimpaired exercise of the right to vote encompasses equality of voting effectiveness as well as

access to the box for "the right of suffrage can be denied by debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds* v. *Sims, supra* at 555.

> There is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth. The right to vote includes the right to have the ballot counted. . . . It also includes the right to have the vote counted at full value without dilution or discount. . . . That federally protected right suffers substantial dilution in this case (where) the favored group has full voting strength (and) the groups not in favor have their votes discounted. *South v. Peters*, 379 U.S. 276, 279 (1950) (Douglas and Black, JJ., dissenting).

Gray v. *Sanders, supra,* established the standard against which claimed impairment of the right to vote through dilution or debasement would be judged. This standard is equality of voting power among all persons voting at the election.

> Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of "we the people" under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications. The idea that every voter is equal to every other voter in his State, when he casts

> his ballot in favor of one of several competing candidates, underlies many of our decisions.
>
> • • •
>
> The only weighting of votes sanctioned by the Constitution concerns matters of representation. . . . But once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded.
>
> • • •
>
> The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing —one person, one vote. *Id.* at 379-81.
>
> • • •

Gray involved a single question of the weight to be given each man's vote in an election, and clearly stated that "the present case is only a voting case." The "one person, one vote" principle of *Gray*, however, has been the dominant force behind the decisions of this Court in subsequent cases dealing with congressional districting, *Wesberry;* the apportionment of seats in state legislatures, *Reynolds* and its companion cases; the apportionment of seats in local governing bodies, *Avery v. Midland County*, 390 U.S. 494 (1968); and the composition of bodies formed for special, limited purposes, *Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969); *Hadley v. Junior College District*, ... U.S. ....., 25 L. Ed.2d 45 (1970). Although each of these cases involved apportionment of representatives among geographical units, the rationale of the cases is the same as that of *Gray*—that each voter in an election must have an equal influence in determining the outcome of the elec-

tion. The touchstone of "one person, one vote" is equality within the electorate.

The right to vote is no less sacred when it is cast in a referendum involving questions of governmental policy than when it is cast for a competing candidate. This Court has frequently held that "once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." *Harper* v. *Virginia Board of Elections*, 383 U.S. 663, 665 (1966). See also *Kramer* and *Hadley*.

> When a court is asked to decide whether a state is required by the Constitution to give each qualified voter the same power in an election open to all, there is no discernible, valid reason why constitutional distinctions should be drawn on the basis of the purpose of the election. *Hadley*, 25 L. Ed.2d at 50.

In *Phoenix v. Kolodziejski*, ... U.S. ....., 26 L.Ed.2d 523 (1970) and *Cipriano* v. *City of Houma*, 395 U.S. 701 (1969) this Court applied the Equal Protection Clause to local elections involving the sole question of whether to authorize the issuance of general obligation and revenue bonds, respectively. The issue presented in those cases was whether the State had impermissibly excluded non-property owners from the electorate, but, it is the application of the Equal Protection Clause to the election which is significant, and not the purpose of the election. The test is whether the claimed impairment of the right to vote occurred as a part of "the electoral process" *Moore v. Ogilvie*, 394 U.S. 814, (1969); *Harper*.

The Supreme Court of New Mexico in *State ex rel. Witt* v. *State Canvassing Board*, 437 P.2d 143. (1968) reached this very question and made the logical applica-

tion of *Gray* to voting requirements of the state for the ratification and adoption of constitutional amendments by the people.

> We see no rational basis to distinguish between voting on representatives in the legislature, and voting on constitutional amendments. One is no more a necessary ingredient of our democratic process than the other. Nor can it be said that an equal voice in the selection of the legislature is of greater importance to a citizen than equality of weight and expression of views on changes in our basic charter, the Constitution. As a matter of fact, it is amply evident that the constitutional provision here being considered was quite definitely placed in the constitution to preserve certain rights in a minority group. It has now been made clear that when this is done there is no political equality under the Fourteenth Amendment. . . . (Citing *Gray*). *Id.* at 151.

Thus, in referendums involving questions of governmental policy, as in elections between competing candidates, each voter favoring one side of the proposition must stand on the same footing as any other voter favoring the opposite side of the proposition. Each must have the same opportunity to influence the outcome of the election if there is to be equality within the electorate.

B.

The West Virginia 60% Affirmative Vote Requirements Constitute A State Grant Of 50% Greater Voting Effectiveness To Every Person Voting In The Negative And Thereby Debase Or Dilute The Vote Of Each Person Voting In The Affirmative.

Section 1, Article X of the Constitution of West Virginia, known as the "Tax Limitation Amendment," after

dealing with equal taxation and a maximum rate of taxation, then provides that the State legislature may authorize local levying bodies to tax at a rate above the normal maximum if such an increased levy is favored by "at least 60% of the qualified voters"[1] within the taxing unit. This authorization is embodied in West Virginia Code, ch. 11, art. 8, §16 (Michie 1966).

Section 8, Article X of the Constitution of West Virginia provides that school districts and other local levying bodies may incur indebtedness within certain limits provided ". . . all questions connected with the same shall have been first submitted to a vote of the people, and have received three-fifths of all the votes cast for and against the same." The statutory authority for incurring such indebtedness upon a three-fifths favorable vote is found in West Virginia Code, ch. 13, art. 1, §§ 4, 14 (Michie 1966).

Thus, for a county board of education in West Virginia to raise revenues for school improvements above its usual annual income, it must obtain three-fifths or 60% approval of the qualified voters participating in the election to increase the tax levy or incur indebtedness by the issuance of bonds.

Clearly, the end result of the application of the 60% affirmative vote requirements constitutes a grant of 50% greater voting power to persons opposing the raising of additional revenues for school improvements, thereby diluting and debasing the weight of votes of persons favoring school improvements. Since 40% of the electorate can prevail if they happen to oppose the increasing of revenues for school improve-

[1]This language has been construed to mean 60% of the votes actually cast. *Warden v. County Court*, 116 W. Va. 695, 183 S.E. 39 (1935).

ments, each "no" vote counts 150% as much as any "yes" vote in terms of its effect upon the outcome of the election. In practical terms this means that three "yes" votes have the same influence on the ultimate result as only two "no" votes.

It would be a functional equivalent of the above constitutional and statutory provisions if West Virginia had provided instead, that before counting the votes one-third of all affirmative votes would be discarded or that after counting the votes all negative votes would be multiplied by a factor of 1.5. Any such scheme would undoubtedly be held to impermissibly dilute the votes of persons favoring the proposition.

> . . . if a State should provide that the votes of citizens in one part of the State should be given two times, or five times or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted. *Reynolds v. Sims, supra* at 562.

The sixty percent affirmative vote requirements, then, present the exact question which was decided in *Gray*—how can one person be given voting power 50% greater than another person in a county-wide referendum merely because he does not believe the proposition being voted upon should pass. The answer to the question is supplied in the plain finding of *Gray*—once the geographical unit in which the proposition is to be applied has been designated and the qualifications of the voters fixed, all who participate in the election must have an equal voice.

The petitioners have argued that respondents' votes were not diluted in the elections in question by the application of the sixty percent affirmative vote re-

quirements, because each voter in the election cast one vote and each vote was counted as one vote. They misconceive or ignore this Court's application of the term "dilution", however. The concept of equality within the electorate, clearly enunciated in *Gray*, relates to the *relative effect of voting power between voters* and requires that each voter have the same influence in determining the outcome of the election. Thus, it is not the quantitative casting of the votes or their counting, but the qualitative application of the sixty percent affirmative vote requirements to the votes as counted which is significant in the consideration of equality within the electorate.

Furthermore, the disparity in the effectiveness of voting power which results from the application of the sixty percent voting requirements is based solely upon the way a citizen votes. Those voting in the affirmative have been effectively "fenced out" from a part of their voting power simply because of the way they *might* vote, the procedure condemned in *Carrington* v. *Rash*, 380 U.S. 89 (1965) in which military personnel stationed in Texas were denied the right to vote, because of the overwhelming weight which their votes might have upon a local election. The requirement of a sixty percent affirmative vote is but a more subtle approach to that which was proscribed in *Carrington*—here a heavier burden is placed on those whose views are apparently disfavored by the State.

Petitioners reliance on *Fortson* v. *Morris*, 385 U.S. 231, (1966) is misplaced. All that was decided in *Fortson* was that a state did not have to submit the selection of public officials to a vote of the people; and that it was constitutionally permissible to provide, in case no candidate received a majority of the votes in a gubernatorial

election, that the legislature should elect the governor. There was no question of vote dilution in the election. This holding is made clear by the subsequent decisions of *Kramer* and *Hadley*, that although there may be no requirement that a question be submitted to the voters, "once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." *Harper v. Virginia Board of Elections, supra* at 665.

In requiring a 60% affirmative vote in these elections, the State has placed its thumb on the negative side of the election scales; in so doing it has diluted the voting power of all affirmative votes and drawn a line which is inconsistent with the Equal Protection Clause of the Fourteenth Amendment.

C.

There Is No Competing State Interest Which Will Justify, Within The Constitutional Concept Of Equal Protection, The Debasement And Dilution Of Respondents' Votes In The School Bond And Increased Tax Levy Election.

A State has broad powers to determine the conditions under which the right of suffrage may be exercised; such regulations carry a presumption of constitutionality. *Lassiter* v. *Northampton County Board of Elections*, 360 U.S. 45 (1959). A State has the power to define the electorate thereby excluding some otherwise qualified voters; but the State may properly exercise this power only when the definition and resulting exclusion are necessary to promote a compelling state interest. *Phoenix; Cipriano; Kramer.* "But . . . the interest of the State, when it comes to voting is limited to the power to fix qualifications." *Harper v. Virginia Board of Elections, supra* at

668. Once the electorate is properly defined, the State has no power to impose any burden on the exercise of the franchise which has the effect of diluting the voting power of some of the electorate.

> Presumptively, when all citizens are affected in important ways by a governmental decision subject to a referendum, the Constitution does not permit weighted voting or the exclusion of otherwise qualified citizens from the franchise. *Phoenix v. Kolodziejski*, 26 L.Ed.2d at 527.

Gray clearly established the principle that equal protection means equality of voting power within the electorate. It was "only a voting case" and made clear that once the geographical unit for the election is designated and the qualifications of the voters fixed "all who participate in the election are to have an equal vote." *Wesberry, Reynolds*, and the subsequent apportionment cases applied this principle with increasing vigilance. Any state election scheme, where the ratio of voting effectiveness between any two voters deviates more than minimally from a standard of equality, impermissibly debases or dilutes the vote. See, *e.g.*, *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969). In none of these cases was a "compelling state interest" permitted to justify any deviation from the standard of equality established in *Gray*. It is only in cases involving the fixing of the qualifications of the voters and the exclusion of some voters from the franchise that a "compelling state interest" or a rational basis for the state plan has been discussed or permitted to justify obvious discrimination under the Equal Protection Clause. See *Harper, Carrington, Cipriano, Phoenix*.

There can be, therefore, no competing state interest which will justify the debasement and dilution of the

votes of a portion of the electorate because of the way they vote. To argue otherwise ignores the plain finding of *Gray*, and leads inevitably to the systematic frustration of the will of the majority of the voters contrary to the "democratic ideals of equality and majority rule, which have served this Nation so well in the past," *Reynolds*, 377 U.S. at 566. The efforts of the citizens of Roane County to improve their schools and the education of their children, and the experience in other counties in West Virginia and throughout the nation in similar referendums for educational and other governmental purposes are indicative of this trend.

Apparently petitioners take the position that the 60% affirmative vote requirements serve the compelling state interests of the prevention of "burdensome indebtedness and excessive taxation", the State's "reputation for fiscal integrity", and "restriction on fiscal irresponsibility". (Petitioners' Brief 11). These statements of state interests are too vague to be compelling, but assuming, *arguendo*, that they are compelling state interests, the 60% affirmative vote requirement is not necessary for their achievement.

For reasons equally applicable here, but which for the sake of brevity will not be repeated, the Supreme Court of California has, upon detailed consideration, held that there could be no necessary connection between California's two-thirds affirmative vote requirement in local bond referendums and the argued state interest of local fiscal responsibility. *Westbrook* v. *Mihaly*, 2 Cal.3d 765, 471 P.2d 487 (1970). Furthermore, if the argument were logically sound, that the 60% affirmative vote requirement is necessary to the accomplishment of local fiscal responsibility, there should be

widespread fiscal instability within the 30 states which have no such special majority requirements in local bond referendums. See the appendix to Note, 56 Va. L. Rev. 295 (1970).

West Virginia's three-fifths affirmative vote requirement relating to the incurring of bonded indebtedness is but one of many checks against local fiscal irresponsibility. Judge Haymond, a member of the 1872 Constitutional Convention which first wrote this provision, said of Section 8, Article X of the West Virginia Constitution in *List* v. *City of Wheeling*, 7 W.Va. 501 (1874):

> The evident object of the section was to prevent a growing evil of the day, viz: The creation of large debts, the unnecessary and wasteful, as well as fraudulent, expenditure of the substance and earnings of the people and unnecessary and oppressive taxation. Whether the section will accomplish the object or not remains to be seen by experience. It is to be hoped it will. *Id.* at 523.

It is to be noted that this section in its inception was not apparently viewed as *necessary* to the accomplishment of the stated objective, rather it was experimentally conceived in the *hope* of accomplishing this end. Judge Haymond said nothing from which the necessity of the three-fifths affirmative vote in accomplishing this end can be inferred. However, he stated:

> The plain and evident meaning, and intent of the people in the adoption of this section of the tenth article of the Constitution was to prescribe a limit beyond which cities, counties &c., should not go in the contraction of debts. *Id.*

The absolute limit on debt (five per centum of the value of the taxable property within the unit) imposed by another provision of this section is the really effective

method by which local fiscal irresponsibility in incurring unwise large debts is accomplished. This end is further advanced by the regulatory provisions contained within Article 1, Chapter 13 of the West Virginia Code dealing with public bond issues.

With regard to the increased tax levy, Section 1, Article X of the West Virginia Constitution provides, in addition to the 60% affirmative vote requirement, an absolute limit upon the amount of any increased taxation and an absolute limit on the length of time the increased tax levy will be effective. By reason of Section 10 of this Article, known as the Better Schools Amendment, these absolute limits are slightly raised when the increased tax levy is only for the support of public schools. The absolute limit upon tax levies for the support of public schools in West Virginia is $1.00 per hundred dollars value on agricultural and intangible personal property, $2.00 per hundred dollars value on owner-occupied real estate, $3.00 per hundred dollars value on all other property outside municipalities, and $4.00 per hundred dollars value on all other property within municipalities. The absolute time limit for such increased levies is five years.

If the State of West Virginia has prescribed absolute maximums as to the amount of debt a local taxing unit can incur and as to the rate of taxation, has it not thereby prescribed the perimeter of fiscal responsibility? If the State has set outside limits of possible indebtedness and rates of taxation, then it implies if the local taxing units stay within these bounds, they should not get into financial difficulties and the people will not be taxed oppressively. What difference does it make whether the maximum limit is reached by 51% vote or by 60% vote?

Respondents are unable, therefore, to conceive of any necessary connection between these 60% affirmative vote provisions and local fiscal responsibility; furthermore, petitioners have ignored their burden and suggested none.

Since there is no demonstrable necessity for a 60% affirmative vote in local referendum elections concerning increased tax levies and incurring bonded indebtedness to accomplish even the arguably compelling state interest of local fiscal responsibility, such being adequately accomplished by absolute constitutional maximum ceilings, and since the 60% affirmative vote provisions do impose inequalities on the electorate and thwart the will of the majority by debasing the votes of those who favor such propositions, the 60% affirmative vote provisions cannot stand contrary to the Equal Protection Clause of the Fourteenth Amendment.

CONCLUSION

The respondents respectfully urge this Court to affirm the decision of the Supreme Court of Appeals of West Virginia because that Court correctly ascertained and applied the principles of equal protection contained in the Fourteenth Amendment in order to prevent debasement of respondents' votes.

Respectfully submitted this 18th day of September, 1970.

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APPENDIX

West Virginia Constitution, Article X, Section 1 provides:

> 1. Subject to the exceptions in this section contained, taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value to be ascertained as directed by law. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value; except that the aggregate of taxes assessed in any one year upon personal property employed exclusively in agriculture, including horticulture and grazing, products of agriculture as above defined, including live stock, while owned by the producer, and money, notes, bonds, bills and accounts receiveable, stocks and other similar intangible personal property shall not exceed fifty cents on each one hundred dollars of value thereon and upon all property owned, used and occupied by the owner thereof exclusively for residential purposes and upon farms occupied and cultivated by their owners or bona-fide tenants one dollar; and upon all other property situated outside of municipalities, one dollar and fifty cents; and upon all other such property situated within municipalities, two dollars; and the legislature shall further provide by general law, for increasing the maximum rates, authorized to be fixed, by the different levying bodies upon all classes of property, by submitting the question to the voters of the taxing units affected, but no increase shall be effective unless at least sixty per cent of the qualified voters shall favor such increase, and such increase shall not continue for a longer period than three years at any one time, and shall never exceed by more

than fifty per cent the maximum rate herein provided and prescribed by law; and the revenue derived from this source shall be apportioned by the legislature among the levying units of the State in proportion to the levy laid in said units upon real and other personal property; but property used for educational, literary, scientific, religious or charitable purposes, all cemeteries, public property, the personal property, including live stock, employed exclusively in agriculture as above defined and the products of agriculture as so defined while owned by the producers may by law be exempted from taxation; household goods to the value of two hundred dollars shall be exempted from taxation. The legislature shall have authority to tax privileges, franchises, and incomes of persons and corporations and to classify and graduate the tax on all incomes according to the amount thereof and to exempt from taxation, incomes below a minimum to be fixed from time to time, and such revenues as may be derived from such tax may be appropriated as the legislature may provide. After the year nineteen hundred thirty-three, the rate of the State tax upon property shall not exceed one cent upon the hundred dollars valuation, except to pay the principal and interest of bonded indebtedness of the State now existing.

West Virginia Constitution, Article X, Section 10 provides:

10. Notwithstanding any other provision of the Constitution to the contrary, the maximum rates authorized and allocated by law for tax levies on the several classes of property for the support of public schools may be increased in any school district for a period not to exceed five years, and in an amount not to exceed one hundred per cent of such maximum rates, if such increase is approved, in the manner provided by law, by at

least sixty per cent of the qualified voters of the school district.

Notwithstanding any other provision of the Constitution to the contrary, the maximum rates provided for tax levies by school districts on the several classes of property may be used entirely for current expense purposes; and all levies required for principal and interest payments on any bonded indebtedness, now or hereafter contracted, not to exceed five per centum on the value of the taxable property therein, the value to be ascertained in accordance with section eight of this article, shall be laid separate and apart and in addition to such maximum rates, but in the same proportions as such maximum rates are levied on the several classes of property.

No. 76

A. T. GORDON, ET AL.,

Petitioners,

v.

GRANVILLE H. LANCE, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION, THE CALIFORNIA TEACHERS ASSOCIATION, IDAHO EDUCATION ASSOCIATION, IOWA STATE EDUCATION ASSOCIATION, THE KANSAS STATE EDUCATION ASSOCIATION, NEW HAMPSHIRE EDUCATION ASSOCIATION, NORTH DAKOTA EDUCATION ASSOCIATION, WASHINGTON EDUCATION ASSOCIATION AND ST. LOUIS SUBURBAN TEACHERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF POSITION OF RESPONDENTS

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IN THE SUPREME COURT OF THE UNITED STATES

No. 96

A. T. GORDON, ET AL.,

Petitioners,

v.

GRANVILLE H. LANCE, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION, THE CALIFORNIA TEACHERS ASSOCIATION, IDAHO EDUCATION ASSOCIATION, IOWA STATE EDUCATION ASSOCIATION, NEBRASKA STATE EDUCATION ASSOCIATION, NEW HAMPSHIRE EDUCATION ASSOCIATION, NORTH DAKOTA EDUCATION ASSOCIATION, WASHINGTON EDUCATION ASSOCIATION AND ST. LOUIS SUBURBAN TEACHERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF POSITION OF RESPONDENTS

INTEREST OF AMICI CURIAE

All parties have consented to the filing of this brief.[1]

The National Education Association of the United States (NEA) is an organization composed of more than one million professional educators. Founded in 1857, it was granted a corporate charter by special Act of Congress in 1906. Its purpose is to improve the character and advance the in-

[1] The consents of both parties have been filed, in accordance with Rule 42(2) of the Rules of this Court, with the Clerk of the Court.

terests of the teaching profession and to promote the cause of education in the United States. Accordingly, for more than a century it has worked to improve the quality of education and has striven to insure an essential means to that end—the adequate and equitable financing of public schools.

The Association's interest in the present case stems from the adverse impact on the quality of educational facilities and services that is caused by the extraordinary majority voting requirement imposed by the Constitution of West Virginia and similar provisions in other states with respect to school financing proposals. School districts subject to these requirements have been forced, among other things, to make capital expenditures with funds that should be used to meet current needs and to resort to unsatisfactory and uneconomical methods of financing capital improvements. Many districts, notably in impoverished areas of the nation and in rapidly growing areas at the fringes of urban population centers, have been compelled to forego for extended periods of time essential capital outlays for construction or renovation of buildings, together with the acquisition of needed equipment—desks, audio-visual apparatus, laboratory devices, buses, and the like. The case at bar proves the point. There have been no new schools built or major additions or improvements made to existing schools in the county involved in this suit, Roane County, West Virginia, since 1946.

From its perspective as the nation's largest association of professional educators, NEA is deeply concerned about such conditions in the public school system. A number of state and local associations affiliated with the National Education Association, some of which have initiated or are participating in litigation challenging supermajority requirements in their respective States (see p. 6, n. 4, *infra*), share this concern and have joined this brief. We urge that the "supermajority" voting requirements here in issue, which have brought about such thoroughly undesirable consequences, violate the Equal Protection Clause of the Fourteenth Amendment.

QUESTION PRESENTED

Whether the extraordinary voting requirements of Sections 1 and 8 of Article X of the West Virginia Constitution and statutes enacted pursuant to those provisions violate respondents' right to equal protection of the laws under the Fourteenth Amendment.

STATEMENT

This litigation is rooted in the repeated frustration of the desire of a majority of the voters in Roane County, West Virginia, to adopt tax and bond proposals which they deem essential to the provision of adequate public education in Roane County.

Roane County is one of the relatively poor counties of West Virginia and has long suffered from serious deficiencies in its educational plant and resources. Of the 55 counties in West Virginia, Roane County ranks 34th in taxable resources and 38th in per capita personal income. See App. A, Tables 1 & 2, *infra*. Its actual per pupil expenditure in the 1967-68 school year (the latest figures available to NEA) was $509.77, as contrasted with a figure of $795.50 in Hancock County (the highest in West Virginia), and national and West Virginia statewide averages of $680.00 and $564.13, respectively. (See App. A, Table 3, *infra*.) According to the allegations of the plaintiffs below, which are not contested, there have been no new schools constructed or major additions or improvements made to existing schools in the county since 1946. In consequence, the county's schools are not only old but also inadequate to the ever-growing needs of the times. An average of 31.2 pupils are assigned to each elementary school classroom and an average of 25.5 pupils to each secondary school classroom, compared with state averages of 28 and 23.6, respectively. But beyond this sort of statistical evidence of the inferiority of the Roane County Schools, an even more telling fact is that the State Fire Marshall and the State Superintendent of Schools have prohibited further use of portions of two of the county's major

schools because of serious fire hazards. Dangerous and makeshift conditions also exist in many other schools. (Appx. 6a, 31a.)

A variety of causes, of course, may be responsible for such a lamentable situation. Often the reason is the relative poverty of the school district coupled with an unwillingness of the *majority* of the voters to make special sacrifices to overcome that disability. But that is not the reason for Roane County's difficulties; the deficiencies in Roane County's schools result directly from the *extraordinary majority* voting requirements of Sections 1 and 8 of Article X of the West Virginia Constitution and implementing statutory provisions.

Section 1 of the West Virginia Constitution provides that tax rates may exceed stated limits only if they are submitted to the voters of the taxing unit affected and 60 percent of the voters favor the higher rates.[2] Section 8 provides that no county, city, school district, or municipal corporation may incur indebtedness exceeding 5 percent of the assessed value of the taxable property therein, and may incur indebtedness within that limitation only if the question is submitted to a popular vote at which 60 percent of the votes cast are in favor of incurring the indebtedness.[3]

Pursuant to these requirements, proposals to borrow money and levy taxes needed to cure some of the deficiencies in the Roane County schools have repeatedly been submitted to the voters of Roane County; and because of these

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[2]The limits, per $100 of value, are 50 cents on personal property used exclusively in agriculture; $1 on all other property owned, used, and occupied by the owner for residential purposes and upon farms; $1.50 on all other property situated outside of municipalities; and $2 on all other property situated within a municipality.

[3]Section 8 also provides that at the time any debt is incurred, provision must be made "for the collection of a direct annual tax . . . separate and apart from and in addition to all other taxes . . . sufficient to pay, annually, the interest on [the] debt, and the principal thereof," within 34 years.

requirements, they have repeatedly been defeated. Six such proposals were submitted to the voters between 1964 and 1968. All six proposals received a majority of affirmative votes. But none received the 60 percent favorable vote required by Sections 1 and 8 of Article X of the State Constitution. (App. 31a; see App. A, Table 4, *infra*.)

Most recently, on April 29, 1968, the Roane County Board of Education submitted two proposals to the voters. One was a proposal to issue bonds in the amount of $1,830,000 to alleviate the overcrowded condition of the classrooms and school facilities, to remove the fire hazards, to provide more adequate and modern facilities, and to meet the needs of disadvantaged children. The second was a proposal to lay tax levies exceeding the regular rates for a period of five years, the resulting income to be used in part for current expenditures of the school system and in part for capital improvements in the school plant. A majority of the votes cast favored each proposal. However, the Board of Education could not issue the bonds or levy the additional taxes because the favorable vote was not large enough to satisfy the State's extraordinary majority requirements. (Appx. 25a-26a.)

Respondents thereupon instituted the present actions in state court, claiming that the extraordinary majority requirements of Sections 1 and 8 and the implementing statutes violate respondents' rights under the Equal Protection Clause of the Fourteenth Amendment. Respondents requested the court to require the school board to issue the bonds and levy the taxes approved by the voters. The trial court declined to grant such relief, but the State Supreme Court of Appeals reversed. Its decision is now before this Court for review. (Appx. 26a-27a, 39a.)

The issue presented does not affect West Virginia alone, nor does the West Virginia litigation stand alone. Extraordinary majority requirements applicable to school bond and tax proposals exist, so far as we are able to determine, in 17 states. (See App. A, Table 5, *infra*.) These requirements

include a 55 percent requirement in Nebraska, a 66-2/3 percent requirement in California, Idaho, Kentucky, Missouri, New Hampshire, New York,and Texas, and a 60 percent requirement in the other states having such requirements. Since the decision below, two other state supreme courts have decided the question presented. In *Westbrook v. Mihaly*, 87 Cal. Rptr. 839, 471 P.2d 487 (1970) (App. B, *infra*), the California Supreme Court unanimously concluded that California's extraordinary majority requirement, applicable to local bond elections, was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. In *Bogert v. Kinzer*, 465 P.2d 639 (Idaho, 1970), the Idaho Supreme Court reached a contrary conclusion with respect to the Idaho requirement, one judge dissenting. We understand that a number of actions challenging similar requirements are pending in other States.[4] For reasons stated below, we submit that the West Virginia and California courts were correct, and the Idaho court in error.

SUMMARY OF ARGUMENT

It is incontestable that the West Virginia extraordinary majority requirements applicable to local tax and bond elections value "no" votes more than "yes" votes in determining the outcome of such elections. The question, there-

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[4]Pending actions include *Adams v. Ft. Madison Community School District*, No. 15178, pending (Iowa District Court of Lee County); *Gaudette, et al. v. Peterson, et al.*, (Civ. No. 3328), pending (E.D. Wash.); *Glaser v. Board of Education*, (Civ. No. 69 C 284 (2)), pending (E.D. Mo.); *Nelsen v. Evans, et al.*, (Civ. No. 8633), pending (W.D. Wash.); *Priesler, et al. v. Board of Education*, (Civ. No. 69 C 339 (1)), pending (E.D. Mo.); *Priesler v. Mayor of St Louis*, (Civ. No. 69 C 250 (1)), pending (E.D. Mo.); *Thurston v. Greco*, (No. 41444), pending (Wash. Supreme Court); *Tiews v. Timberlane Regional School District*, (No. 6103), pending (New Hampshire Supreme Court).

In *Brenner v. Kansas City School District*, ___ F. Supp. ___, 39 LW 2121-22 (W.D. Mo., 1970), a three-judge federal district court held that Missouri's extraordinary majority requirements for school tax levies and bond issues were not violative of the Equal Protection Clause.

fore, is whether that differentiated treatment is permissible under the Equal Protection Clause. It is not.

1. While departures from the principle of political equality and its corollary, majority rule, have occurred during the course of our history, see *Baker v. Carr*, 369 U.S. 186, 307-323 (1962) (Frankfurter, J., dissenting); *Reynolds v. Sims*, 377 U.S. 533, 595-624 (1964) (Harlan, J., dissenting), our national commitment to this principle and its corollary goes back to the beginnings of the nation. Thus, the Declaration of Independence committed us to the "self-evident" proposition that "all men are created equal." To Jefferson, the author of the Declaration, majority rule was the "fundamental law" of "every society of individuals of equal rights." Letter to Baron von Humboldt, 1817, Jefferson, *Democracy* (Padover ed., 1939). And through, to be sure, the Constitution restricted majority rule in important and well known particulars, nevertheless its principal spokesmen were committed to values not different from Jefferson's in this regard. Thus, Hamilton, in *The Federalist*, No. 22, was of the view that a "fundamental maxim of republican government" required that "the sense of the majority should prevail" and that extraordinary majority requirements, which defeat majority rule, are likely to do serious injury to the public welfare. Lincoln's Gettysburg Address, the Equal Protection Clause of the Fourteenth Amendment, and the Fifteenth, Seventeenth and Nineteenth Amendments reaffirmed and strengthened our national commitment to political equality.

2. The West Virginia scheme is invalid under this Court's apportionment and districting decisions, which are premised upon the constitutional requirements of political equality and majority rule. In *Gray v. Sanders*, 372 U.S. 368 (1963), the Court held that "once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote," 372 U.S., at 380, noting that "the conception of political equality," from the Declaration of Independence to

the Nineteenth Amendment, "can mean only one thing—one person, one vote." In *Wesberry v. Sanders*, 376 U.S. 1 (1964), the Court held that the Constitution requires that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." 376 U.S., at 7-8; *Hadley v. Junior College District*, 397 U.S. 50, 52 (1970). In *Reynolds v. Sims*, 377 U.S. 533 (1964), the Court held that because all citizens are entitled to an equal voice in their government, state legislative malapportionment is unconstitutional, approving previously stated views of Mr. Justice Black and Mr. Justice Douglas that schemes that weight or dilute the vote are unconstitutional. Moreover, Mr. Justice Stewart's opinions in *Gray* and in the apportionment cases indicated his agreement that "within a given constituency there can be room for but a single constitutional rule—one voter, one vote," and indicated further that apportionment schemes that systematically frustrate the "will of a majority" and that are beyond the power of a majority to alter violate the Equal Protection Clause.

The West Virginia scheme cannot stand under the principles applied in these decisions. The Court has held them to be applicable to local elections. *Avery v. Midland County*, 390 U.S. 474 (1968); *Hadley v. Junior College District, supra.* Moreover, the premise of the apportionment decisions is that under the Constitution all citizens are entitled to an equal voice in their government. Therefore it does not matter whether the election of representatives is involved or an election in which the people exercise legislative powers themselves. In either event, "political equality . . . can mean only one thing—one person, one vote."

Nor does it matter that this case involves restrictions on majority rule applicable only to the levy of taxes and the issuance of bonds, rather than to a broader range of governmental decisions. The purpose of an election is immaterial, so far as the applicability of this Court's equal participation decisions is concerned. *Hadley v. Junior College District, supra.* Moreover, education—and the financing of edu-

cation—is the most important function of local government today. *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). Therefore, the governmental functions involved are sufficient to justify the conclusion that the principles applied in the apportionment decisions are applicable here. See *Hadley v. Junior College District, supra.*

Finally, West Virginia's extraordinary majority requirements are particularly censurable because they are contained in its Constitution and thus can be amended only with the approval of representatives of two-thirds of the people of the State. But it would make no difference if those provisions could be changed by a majority of the legislature. The sometimes difficult job of enlisting the support of a majority of a legislature, and the enormous job of enlisting the support of a majority of the people of a State, make statewide remedies irrelevant as a practical matter. Moreover, such remedies are irrelevant as a legal matter. "An individual's constitutionally protected right to cast an equally weighted vote cannot be denied even by a majority . . . ." *Lucas v. Colorado Gen. Assembly*, 377 U.S. 713 (1964).

3. The West Virginia scheme is also invalid under this Court's decisions with respect to denials of the franchise, specifically, its decisions in *Carrington v. Rash*, 380 U.S. 89 (1965), and *Cipriano v. City of Houma*, 395 U.S. 701 (1969). In *Carrington*, the Court rejected a contention that it was permissible to exclude military servicemen from the franchise because, *e.g.*, they might be unwilling to "invest in the future of the area," holding that " '[f]encing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible," 380 U.S., at 94. That conclusion was reaffirmed in *Cipriano*, 395 U.S., at 706. The instant case involves the other side of the coin—a measure that limits the value of some citizens' votes for fear that voters may be only too willing to "invest in the future of the area." That is equally impermissible. *Carrington* cannot be distinguished on the ground that it was a voter exclusion case, for statutes providing for weighted

voting—measures that give some voters only a part of a vote *vis-a-vis* other voters—do result in partial exclusions from the franchise. To illustrate the point, Texas could not save the laws held unconstitutional in *Carrington* by giving military personnel only two-thirds of a vote.

4. If they are not unconstitutional for reasons stated above, the West Virginia extraordinary majority requirements are unconstitutional because they are not necessary to promote a compelling state interest and indeed are not rationally founded upon any valid state purpose. "Presumptively, when all citizens are affected in important ways by a governmental decision subject to a referendum, the Constitution does not permit weighted voting . . . ." *Phoenix v. Kolodziejski*, 399 U.S. 204 (1970). Measures that dilute or restrict the franchise can be sustained only if they are necessary to promote a compelling state interest. *Kramer v. Union School District*, 397 U.S. 621 (1969).

The inadequacy of alleged justifications for measures like West Virginia's is demonstrated first by this Court's decisions in *Kramer*, *Cipriano* and *Phoenix*. In those cases, the Court struck down restrictions on the franchise allegedly designed to protect the interests of property taxpayers, holding that such restrictions are not necessary to protect such interests.

Moreover, the only alleged state objectives advanced to justify measures like West Virginia's are clearly unsound as a matter of fact.

a. Petitioner suggests that such measures curb municipal extravagance and thus contribute to financial "integrity." Studies show, however, that institutional factors in the bond market and requirements insuring the repayment of bonds—*e.g.*, the requirement in the West Virginia Constitution that a separate tax be levied at the time bonds are approved to retire them when due (W. Va. Const. art. X § 8)—are responsible for financial responsibility and integrity. We have found no study showing a correlation between the most readily

accessible indicator of the quality of local government bonds –ratings by various services–and the presence or absence of extraordinary majority requirements. Indeed, the unanticipated side effect of such requirements appears to be the development in many states of a variety of financial arrangements designed to circumvent the extraordinary majority requirements, including the establishment of "special districts" not subject to such requirements and the use of revenue bonds and lease-back arrangements. Thus, instead of contributing to financial rectitude, extraordinary majority requirements appear to bring about financial sleight-of-hand by local governmental units.

b. The California Taxpayers Association, as an *amicus*, echoed by the petitioner, claims that extraordinary majority requirements with respect to bond issues are necessary to protect "future majorities" against the "irreversible" decisions of today's profligate voters respecting the incurring of indebtedness. The claim is based upon an infirm premise. The Taxpayers Association says that, unlike the issuance of bonds, most governmental action can be "amended or repealed by the majority if the action turns out to be unwise," but the Taxpayers Association does not say how the consequences of declining to finance adequate education can be "amended or repealed." It requires no great insight to recognize that the consequences of declining to finance adequate education facilities are just as "irreversible" as the consequences of providing that financing. Beyond that consideration, the Taxpayers Association neglects to note that the extraordinary majority requirements at issue here precluded to meet current educational needs, a proposal to which the "future majorities" argument has no relevance whatsoever.

c. Finally, a decision with respect to the constitutional validity of extraordinary majority requirements applicable to bond and tax proposals, based upon the constitutional acceptability of the alleged justifications for such requirements, need not govern other kinds of extraordinary majority requirements–for example, those that allocate power

among coordinate branches of the government, and those that are designed to contribute stability to basic documents organizing the government—which are rooted in considerations quite different from those underlying the West Virginia provisions here at issue. As stated by the California Supreme Court in *Westbrook v. Mihaly, supra,* App. B-48, *infra,* each extraordinary majority requirement "must be judged on its particular facts."

ARGUMENT

Under Sections 1 and 8 of Article X of the West Virginia Constitution and implementing statutory provisions, the vote of each voter opposed to a local property tax or debt proposal subject to Section 1 or Section 8 is worth 50 percent more than the vote of each voter favoring such a proposal in determining whether the proposal will carry. That is, two "no" votes are worth three "yes" votes. That result is incontestably required by Sections 1 and 8.

As the California Supreme Court observed, such an arrangement does not simply classify voters—the ayes on the one side and the nays on the other—but also discriminates between the two classes:

> "It does not require extended discussion to establish that the inevitable result . . . is to give to one group of voters a greater influence on the outcome of an election than [is given] to another group of comparable size but opposite conviction. This is the functional equivalent of according to each person in the former group a vote of relatively greater weight precisely because of his position on the issue which is to be decided. In other words, a result identical to that produced by a two-thirds voting requirement could be achieved by requiring only a 50 percent affirmative vote for passage of bond issue proposi-

> tions but providing that in tabulating the election results each negative vote would be multiplied by two while affirmative votes would be counted at face value. Alternatively, those citizens who opposed a measure could be permitted to vote twice while those who favored it were limited to only one ballot. The biased structure of both of these voting schemes is perhaps more obvious than the discrimination inherent in an extraordinary majority vote requirement. The effect of each, of course, is identical." *Westbrook v. Mihaly*, 87 Cal. Rptr. 839, 471 P.2d 487 (1970), App. B-25, *infra*.

Given this sort of classification and discrimination between the classes established, the question is whether the discrimination is permissible under the Equal Protection Clause.

In the first section of this brief, we review the historical antecedents of our national commitment to political equality and its corollary, majority rule. We then show, in the second section of the brief, that the West Virginia requirements are invalid under this Court's apportionment decisions, which give expression to the constitutional requirements of political equality and majority rule. In the third section of the brief, we demonstrate that the West Virginia requirements are invalid under this Court's decisions in voter-exclusion cases, which hold that limitations on the franchise based upon a voter's stand with respect to political issues are constitutionally impermissible. We then go on in the fourth section of the brief to show that if the West Virginia requirements are not invalid *per se*, under the apportionment and voter-exclusion cases, they must be shown to be necessary to promote a compelling state interest, and that has not and cannot be done. Indeed, the requirements cannot even be claimed to be rationally founded upon any valid state objective. In short, by whatever test the question is decided, West Virginia's extraordinary majority requirements are unconstitutional.

A. WITH EXCEPTIONS STATED IN THE CONSTITUTION, THIS NATION IS COMMITTED CONSTITUTIONALLY TO POLITICAL EQUALITY AND MAJORITY RULE

Our Declaration of Independence committed us to political equality as a first principle of our nation. It was a "self-evident" "truth" to the authors of the Declaration that "all men are created equal," "endowed by their Creator with certain unalienable Rights," and that "to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed . . . ." To Jefferson, this commitment to political equality was a commitment first of all to majority rule. "The first principle of republicanism," he wrote, "is that the *lex majoris partis* is the fundamental law of every society of individuals of equal rights." Letter to Baron von Humboldt, 1817, Jefferson, *Democracy* (Padover ed., 1939). In the absence of majority rule, the political rights of the members of the majority are not equal to the political rights of those of the minority.

The Constitution restricted majority rule in a number of important respects as a consequence of the Great Compromise that was necessary to make one nation of thirteen sovereigns, and the Bill of Rights restricted majority rule still further for the purpose of preserving individual rights. Nonetheless, the principal spokesmen for the Constitution were just as fundamentally committed to political equality and majority rule as Jefferson was. Thus, Hamilton wrote in *The Federalist*, No. 22 (Cooke ed., 1961, at 138-41), that denial of majority rule was one of the principal defects in the Articles of Confederation:

> "The right of equal suffrage among the States is another exceptionable part of the confederation. Every idea of proportion, and every rule of fair representation conspire to condemn a principle, which gives to Rhode-Island an equal weight in the scale of power with Massachusetts, or Connecticut, or New-York; and to Delaware, an equal voice in the

national deliberations with Pennsylvania or Virginia, or North-Carolina. *Its operation contradicts that fundamental maxim of republican government, which requires that the sense of the majority should prevail* . . . .

"But this is not all; what at first sight may seem a remedy, is in reality a poison. *To give a minority a negative upon the majority (which is always the case where more than a majority is requisite to a decision) is in its tendency to subject the sense of the greater number to that of the lesser number.* . . .The public business must in some way or other go forward. If a pertinacious minority can controul the opinion of the majority respecting the best mode of conducting it; the majority in order that something may be done, must conform to the views of the minority; and thus the sense of the smaller number will over-rule that of the greater, and give a tone to the national proceedings. Hence tedious delays—continual negotiation and intrigue—contemptible compromises of the public good . . . .

"It is not difficult to discover that a principle of this kind gives greater scope to foreign corruption as well as to domestic faction than that which permits the sense of the majority to decide . . . . When the concurrence of a large number is required by the constitution to the doing of any national act, we are apt to rest satisfied that all is safe, because nothing improper will be likely *to be done*; but we forget how much good may be prevented, and how much ill may be produced by the power of hindering the doing what may be necessary . . . ." (Emphasis added in first two paragraphs.)

Accordingly, the Constitution provided that the members of the House of Representatives should be elected "by the People," and should be "apportioned among the several States . . . according to their respective numbers . . . ." Const. art. 1, § 2; see *Wesberry v. Sanders*, 376 U.S. 1 (1964).

Some 70 years after the adoption of the Constitution, President Lincoln reaffirmed our commitment to "government of the people, by the people, and for the people," a commitment reflected shortly thereafter by the adoption of the Fourteenth and Fifteenth Amendments, and later by adoption of the Seventeenth and Nineteenth Amendments. In short, as this Court has stated, "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth and Nineteenth Amendments can mean only one thing - one person, one vote," *Gray v. Sanders*, 372 U.S. 368, 381 (1963). That is the antithesis of the West Virginia scheme, which gives "no" voters one-and-one-half votes to every vote given "yes" voters.

B. THE WEST VIRGINIA SCHEME IS INVALID UNDER THIS COURT'S APPORTIONMENT AND EQUAL PARTICIPATION DECISIONS, WHICH ARE PREMISED UPON THE CONSTITUTIONAL REQUIREMENTS OF POLITICAL EQUALITY AND MAJORITY RULE

The constitutional requirements of political equality and majority rule have found expression in recent decisions of this Court invalidating apportionment and voting schemes that dilute the value of some citizens' votes *vis-a-vis* the votes of others.[5] Under these decisions the West Virginia scheme is clearly unconstitutional.

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[5] As the California Supreme Court observed: "more than any decade since that immediately following the Civil War, the 1960's were a time of struggle to transform America's ancient promise of political equality into a reality. Ten years ago many of our citizens were barred from the polls for reasons related to their race, economic status or national background. Others, because of extreme disparities in population among electoral districts, were denied equal representation in Congress, in state legislatures, and in units of local government. Much of this has been changed, some by federal legislation and some by constitutional amendment. But the significant and stirring reforms have been effectuated by the United States Supreme Court which has insisted that our political structures and practices, no matter how venerable their origin, comport with the Fourteenth Amendment." *Westbrook v. Mihaly, supra*, App. B-11, 12, *infra*.

Thus, in *Gray v. Sanders*, 372 U.S. 368 (1963), holding that in a given election every person's vote must be given as much weight as every other person's vote, and therefore that the Georgia County unit system of nominating candidates for state-wide office was unconstitutional, the Court said:

> ". . . Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications . . . . .
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> ". . . .
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> "The only weighting of voters sanctioned by the Constitution concerns matters of representation, such as the allocation of Senators irrespective of population and the use of the electoral college in the choice of a President. Yet when Senators are chosen, the Seventeenth Amendment states the choice must be made 'by the people'. Minors, felons and other classes may be excluded . . . . But *once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded* . . . . The conception of political equality . . . can mean only one thing—one person, one vote." 372 U.S., at 380-81. (Emphasis added.)

Mr. Justice Stewart added that "[w]ithin a given constituency there can be room for but a single constitutional rule—one voter, one vote." 372 U.S., at 382.

Thereafter, in *Wesberry v. Sanders*, 376 U.S. 1 (1964), the Court "held that the Constitution requires that 'as nearly as is practicable one man's vote in a congressional

election is to be worth as much as another's.' " *Hadley v. Junior College District, supra,* 397 U.S., at 52 (1970), quoting *Wesberry v. Sanders, supra,* 376 U.S., at 7-8. Then in *Reynolds v. Sims,* 377 U.S. 533 (1964), the Court held that the requirement of "one voter, one vote" applies to state legislative apportionment. In so holding, the Court approved the view of Mr. Justice Douglas, dissenting in *South v. Peters,* 339 U.S. 276, 279 (1949), that:

> "There is more to the right to vote than the right to mark a piece of paper and drop it in a box . . . The right to vote includes the right to have the vote counted at full value without dilution or discount . . . . That constitutionally protected right suffers substantial dilution . . . [where a] favored group has full voting strength . . . [and] [t]he groups not in favor have their votes discounted." Quoted in 377 U.S. at 555-56, n. 29.

Further, the *Reynolds* Court approved the view of Mr. Justice Black, dissenting in *Colegrove v. Green,* 328 U.S. 549, 569-71 (1946):

> "No one would deny that the equal protection clause would . . . prohibit a law that would expressly give certain citizens a half-vote and others a full vote . . . [T]he constitutionally guaranteed right to vote and the right to have one's vote counted clearly imply the policy that state election systems, no matter what their form, should be designed to give approximately equal weight to each vote cast . . . ." Quoted in 377 U.S., at 563, n. 40.

The Court then went on to hold that both houses of state legislatures must be apportioned by population, premising its holding upon the requirement that each citizen should have an equal voice in governmental decisions–*i.e.*, upon the constitutional requirements of political equality and majority rule:

> "Logically, in a society ostensibly grounded on a representative government, it would seem reasonable that a majority of the people of the State could

> elect a majority of that State's legislators. To conclude differently, and to sanction minority control of state legislative bodies, would appear to deny majority rights in a way that far surpasses any possible denial of minority rights that might otherwise be thought to result. Since legislatures are responsible for enacting laws by which all citizens are to be governed, they should be bodies which are collectively responsive to the popular will. And the concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged. With respect to the allocation of legislative representation, all voters, as citizens of the State, stand in the same relation regardless of where they live . . . . [W]e conclude that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of State legislators . . . . [T]he democratic ideals of equality and majority rule, which have served this Nation so well in the past, are hardly of any less significance for the present and the future." 377 U.S., at 565-66.

While Mr. Justice Stewart did not agree with the Court's application of the principle of political equality in *Reynolds*, he too has expressed a commitment to the values of political equality and majority rule. Thus, in *Lucas v. Colorado Gen. Assembly*, 377 U.S. 713 (1964), he stated that he would uphold a state apportionment plan "so long as [it] reasonably achieves, in the light of the State's own characteristics, effective and balanced representation of all substantial interests, without sacrificing the principle of effective majority rule," 377 U.S. at 751, and "that the Equal Protection Clause demands . . . two basic attributes" of any apportionment plan—that it be rational, and that it "be such as not to permit the systematic frustration of the

will of a majority of the electorate of the State." 377 U.S., at 754.[6]

The West Virginia scheme cannot stand under these decisions. To be sure, we are concerned here with state laws that frustrate majority rule at the local level rather than on a statewide basis. However, it is settled that the "one man-one vote" rule of *Gray*, *Wesberry* and *Reynolds* applies to local elections. *Avery v. Midland County*, 390 U.S. 474 (1968); *Hadley v. Junior College District*, *supra*. Also, to be sure, this case concerns frustration of majority rule in a case in which the people have direct legislative powers, rather than an "election . . . held for the purpose of selecting representative government . . .," *Bogert v. Kinzer*, *supra*, 465 P.2d, at 644—an election "in which representatives are chosen to represent the people." *Brenner v. Kansas City School District*, *supra*, 39 L.W., at 2122. However, that difference, too, is immaterial. The premise of the apportionment decisions was that under the Constitu-

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[6]Using these tests, Mr. Justice Stewart, unlike the majority of the Court, would have found Colorado's apportionment plan proper, stating that:

> "The majority [by popular referendum in 1962] has consciously chosen to protect the minority's interests, and under the liberal initiative provisions of the Colorado Constitution, it retains the power to reverse its decision to do so. Therefore, there can be no question of frustration of the basic principle of majority rule." 377 U.S., at 759.

So, too, Mr. Justice Stewart believed that New York's apportionment plan should be held constitutional because it "guarantee[d] effective majority representation and control in the State Legislature," and was "designed in a rational way to insure that minority voices may be heard, but that the will of the majority shall prevail." 377 U.S., at 764, 765.

In short, both States' plans were proper under Mr. Justice Stewart's analysis because while both "sought to provide that no identifiable minority shall be completely silenced or engulfed," each State had "clearly ensur[ed] that in its legislative councils, the will of the majority of the electorate shall rule. . . ." 377 U.S., at 765.

The provisions for amendment of the West Virginia Constitution are discussed at note 7, *infra*.

tion all citizens are entitled to an equal voice in their government. See *Reynolds v. Sims, supra,* 377 U.S., at 565-66, quoted at pp. 18-19, *supra.* Therefore, it is immaterial whether governmental powers are exercised by the people through representatives, or are exercised by the people directly. In either event, "[t]he conception of political equality . . . can mean only one thing—one person, one vote." *Gray v. Sanders, supra,* 372 U.S., at 381.

Nor does it make any difference that this case involves restrictions on majority rule applicable only to two particular types of decisions—the levy of taxes and the issuance of bonds for educational purposes—rather than to a broader range of governmental decisions. "When a Court is asked to decide whether a State is required by the Constitution to give each qualified voter the same power in an election open to all, there is no discernible, valid reason why constitutional distinctions should be drawn on the basis of the purpose of the election." *Hadley v. Junior College District, supra,* 397 U.S. at 54-55. Moreover, no local governmental decisions are more important than the kinds of decisions involved in this case. As this Court has observed, "Today, education is perhaps the most important function of state and local governments." *Brown v. Board of Education,* 347 U.S. 483, 493 (1954). "Education has traditionally been a vital governmental function. . . ." *Hadley v. Junior College District, supra,* 397 U.S., at 56. The fact that the levy of taxes and the issuance of bonds for school purposes is involved "justif[ies] the conclusion that the principle . . .applied" in the apportionment decisions "should also be applied here." *Id.,* 397 U.S., at 54.

Finally, West Virginia's extraordinary majority requirements are contained in its Constitution and thus can be amended only with the approval of representatives of two-thirds of the people of the State.[7] However, it would make

[7]Amendments to specific provisions in the West Virginia Constitution must be proposed in one or the other of the two houses of the

no difference if those provisions could be changed by a majority of the people in the State directly, or by a simple majority of the legislature. The State, for reasons it deems sufficient, has determined that tax and bond issues should be decided locally by popular referendum. But if a local majority should find themselves stymied persistently by an intractable local minority, it is no answer as a practical matter to tell them to seek relief from a majority of the State legislature, for their problem may or may not be of sufficient magnitude to command the attention of the State legislature, and it is likewise no answer to tell them that they must enlist the support of a majority of the electorate in the State as a whole, frequently an enormous undertaking. Statewide political remedies are no answer as a legal matter, either. As stated in *Lucas v. Colorado Gen. Assembly, supra,* "[a]n individual's constitutionally protected right to cast an equally weighted vote cannot be denied even by a majority of a State's electorate . . . . A citizen's constitutional right can

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state legislature, and then must be approved by two-thirds of the members of each house. Thereafter, they must be approved by a majority of the electorate at the next general election. W. Va. Const. Art. XIV. There is no procedure for amendment by initiative. The only alternative way to change the State Constitution is to convene a new constitutional convention. That could be done by a majority of both houses of the state legislature with the approval of a majority of the electorate, but would be satisfactory only if review of the Constitution were desired, not amendment of a specific provision.

According to the dissenting opinion below, a proposal to amend the super-majority requirements involved in this case was approved by the legislature but defeated by the voters in 1966. Under this Court's decision in *Lucas v. Colorado Gen. Assembly, supra,* that fact is wholly immaterial to the issues in this case. Moreover, the constitutional provisions struck down by the court below can only be amended with the approval of representatives of two-thirds of the electorate in each house of the legislature. Thus, unlike the situation under the liberal initiative provisions of the Colorado Constitution referred to in Mr. Justice Stewart's dissent in *Lucas*, 377 U.S. at 713, the majority in West Virginia has not "retain[ed] the power to reverse its decision" to restrict majority rule with respect to local property tax and debt proposals.

hardly be infringed simply because a majority of the people choose that it be." 377 U.S. at 736-37.[8] *Cf., Reitman v. Mulkey,* 378 U.S. 369 (1967).

In short, under this Court's apportionment decisions–its equal participation decisions–the West Virginia scheme cannot be permitted to stand, for it denies an equal vote to voters who favor school bond and tax proposals, *vis-a-vis* their adversaries. As the Court said last term:

> "This Court has consistently held in a long series of cases, that in situations involving elections, the States are required to insure that each person's vote counts as much, insofar as it is practicable, as any other person's. We have applied this principle in congressional elections, state legislative elections, and local elections. The consistent theme of those decisions is that the right to vote in an election is protected by the United States Constitution against dilution or debasement.

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[8] "'The protection of constitutional rights is not to be approached either pragmatically or expediently, and though the fact of enactment of a constitutional provision by heavy vote of the electorate produces pause and generates restraint we can not, true to our oath, uphold such legislation in the face of palpable infringement of rights. Thus, state racial legislation would unquestionably enjoy overwhelming electorate approval in certain of our states, yet no one would argue that this factor could compensate for manifest inequality. It is too clear for argument that constitutional law is not a matter of majority vote. Indeed, the entire philosophy of the Fourteenth Amendment teaches that it is personal rights which are to be protected against the will of the majority. The rights which are here asserted are the rights of the individual plaintiffs to have their votes counted equally with those of other voters . . . [T]o say that a majority of the voters today indicate a desire to be governed by a minority, is to avoid the issue which this court is asked to resolve. It is no answer to say that the approval of the polling place necessarily evidences a rational plan. The plaintiffs have a right to expect that the cause will be determined in relation to the standards of equal protection. Utilization of other or different standards denies them full measure of justice.'" *Lisco v. Love,* 219 F. Supp. 922, 944 (E.D. Colo., 1963) (dissenting opinion); quoted in *Lucas v. Colorado Gen. Assembly, supra,* 377 U.S., at 737, fn. 30.

> " . . . [O]nce a state has decided to use the process of popular election and 'once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded.' " *Hadley v. Junior College District, supra,* 397 U.S., at 54, 59 (1970), quoting *Gray v. Sanders, supra.*[9]

C. THE WEST VIRGINIA SCHEME IS ALSO INVALID UNDER THIS COURT'S DECISIONS WITH RESPECT TO DENIALS OF THE FRANCHISE.

Not only is the West Virginia scheme invalid under this Court's apportionment decisions, because it denies "one vote" to each voter, but it is also invalid under the Court's decisions with respect to denials of the franchise, beginning with *Carrington v. Rash,* 380 U.S. 89 (1965). In that case the Court struck down a provision of the Texas Constitution disenfranchising all servicemen except those who voted in the county in which they had resided at the time they entered military service. In defense of the provision, Texas argued that the State "has a legitimate interest in immunizing its elections from the concentrated balloting of military personnel, whose collective voice may overwhelm a small local civilian community." 380 U.S., at 93.

The State suggested that a base commander who opposed local police administration or teaching policies in local schools might influence his men, and that local bond issues might fail and property taxes be held at unduly low levels because military personnel are "unwilling to invest in the future of the area." *Id.* In rejecting that contention, the

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[9] *Fortson v. Morris,* 385 U.S. 231 (1966), relied upon by petitioner, was not to the contrary. Petitioner says that the "right of equal participation in the election process does not carry with it a constitutional right to win an election," and states that *Fortson v. Morris* "so held." (Pet. Br. pp. 8-9; see also Calif. Taxpayers Ass'n Br., p. 7.) *Fortson* held nothing of the kind, however. It held that a state could deny the governorship to candidates in a popular election who failed to receive a majority, and could allow the legislature to appoint a governor from one of the two persons receiving the largest number of votes.

Court stated that "'[f]encing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible." 380 U.S., at 94.

In *Cipriano v. City of Houma*, 395 U.S. 701 (1969), the Court reaffirmed its holding in *Carrington v. Rash*, striking down a Louisiana constitutional provision limiting the franchise in municipal utility revenue bond elections to property taxpayers. In so doing, the Court pointed out that "property taxpayers may be concerned with expanding and improving the city's utility operations," for "such improvements could produce revenues which eventually would reduce the burden on the property tax to support city services," while "nonproperty taxpayers may feel that their interests as rate payers indicate that no further expansion of utility debt obligations should be made." 395 U.S. at 705. But, the Court concluded, "these differences of opinion cannot justify excluding either group from the bond election, when, as in this case, both are substantially affected by the utility operations. For, as we noted in *Carrington v. Rash*, '. . . "[f]encing out" from the franchise a sector of the population because of the way they may vote is constitutionally impermissible.'" 395 U.S., at 706.

In this case, we have the other side of the coin from the situation in *Carrington*–a voting regulation that reflects a fear that voters may be only too willing to vote higher taxes and "invest in the future of the area." *Carrington* and *Cipriano* demonstrate, however, that a voter's stand with respect to political issues is not a valid basis upon which to restrict his right to vote.

That conclusion is directly applicable to this case. To be sure, we deal here with a measure that assigns different weights to votes, according to how they are cast, instead of denying the vote altogether. But that is immaterial. The Texas plan surely would have been condemned if servicemen, rather than being wholly deprived of the vote, had been given only two-thirds of a vote. That would constitute a partial denial of the franchise on the

basis held impermissible in *Carrington*. Also, to be sure, in this case we deal with a measure that dilutes the value of votes depending upon how they actually are cast, rather than restricting the franchise "because of the way [the disfavored class of voters] *may* vote." But that likewise is immaterial. The premise of *Carrington* and *Cipriano*, as we read those decisions, is that political orientation is not a valid basis upon which to restrict or limit the value of the vote. Therefore, the West Virginia scheme is unconstitutional for the same reasons that led this Court to strike down the provisions in the Texas and Louisiana constitutions involved in the *Carrington* and *Cipriano* cases.

At various times the right to vote has been restricted because citizens are of a particular race, see *Gomillion v. Lightfoot*, 364 U.S. 339 (1964), or because they are poor, see *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966), or because they do not hold certain property interests, see *Kramer v. Union School District, supra; Cipriano v. City of Houma, supra; Phoenix v. Kolodziejski, supra*, or because they are members of the military services, see *Carrington v. Rash, supra*. Basically, the reason for such restrictions is that someone is concerned about how members of these groups "may vote" or "fear . . . the political views" of the group. *Carrington v. Rash*, 380 U.S., at 94. Voting classifications based upon such considerations are "constitutionally impermissible." *Id.* Likewise, the West Virginia method of "loading the dice" against a particular political viewpoint is unconstitutional.

D. IF THEY ARE NOT OTHERWISE UNCONSTITUTIONAL, THE WEST VIRGINIA EXTRAORDINARY MAJORITY REQUIREMENTS ARE INVALID BECAUSE THEY ARE NOT NECESSARY TO PROMOTE A COMPELLING STATE INTEREST AND INDEED ARE NOT RATIONALLY FOUNDED UPON ANY VALID STATE PURPOSE.

If the Court agrees that the decisions discussed above are dispositive, that will be the end of the case. But even if the Court does not agree with our views as to the effect of the apportionment decisions and *Carrington v. Rash*, the decision below nevertheless should be affirmed. For in that event, the question is whether the West Virginia scheme is "necessary to promote a compelling state interest" and it is clear that it is not. Indeed, it is not rationally founded upon any valid state objective.

As we understand this Court's decisions, it is settled that laws that dilute or restrict the franchise can be sustained only if they are necessary to promote a compelling state interest. Measures that restrict the franchise are presumptively unconstitutional. Thus, in *Reynolds v. Sims, supra,* the Court said that "[S]ince the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." 376 U.S., at 17. And in *Kramer v. Union School District*, 397 U.S. 621 (1969), the Court added:

> "This careful examination is necessary because statutes distributing the franchise constitute the foundation of our representative society. Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government.
>
> "Thus, state apportionment statutes, which may *dilute* the effectiveness of some citizens' votes, receive close scrutiny from this Court . . . . No less rigid an examination is applicable to statutes *deny-*

> *ing* the franchise to citizens who are otherwise qualified by residence and age . . . . [I]f a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest
>
> ". . . [W]hen we are reviewing statutes which deny some residents the right to vote, the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a 'rational basis' for the distinctions made are not applicable . . . ." 395 U.S., at 626-28 (emphasis added).

Likewise, as stated in *Phoenix v. Kolodziejski*, 399 U.S. 204 (1970), in which the Court struck down restrictions on the franchise with respect to general obligation bond elections–the type of election involved in this case–the Court said:

> "Presumptively, when all citizens are affected in important ways by a governmental decision subject to a referendum, the Constitution does not permit weighted voting or the exclusion of otherwise qualified citizens from the franchise . . . . Placing [the power to approve or disapprove facilities which the municipal government has determined should be financed by issuing general obligation bonds] in property owners alone can be justified only by some overriding interest of those owners which the State is entitled to recognize." 399 U.S., at 209.

The West Virginia provisions now before this Court undeniably value "yes" votes less than "no" votes in determining the outcome of local bond and tax elections. Thus, they dilute the value of votes cast by "yes" voters *vis-a-vis* the votes cast by those who oppose them, or to phrase it another way, they partially deny some voters a vote by giving other voters a bigger vote. Accordingly, if the West Virginia extraordinary majority requirements are not invalid

per se, they clearly can be sustained only if they are "necessary to promote a compelling state interest."

The West Virginia requirements do not meet that test. Indeed, they are not rationally founded upon any valid state purpose. That is demonstrated, we believe, both by this Court's decisions in *Kramer v. Union School District, supra*, and the bond election decisions based upon *Kramer*,[10] and by an appraisal of the allegedly relevant state interests.

In *Kramer*, the Court struck down a New York law that limited the franchise in certain school elections to property holders and parents, classes of voters alleged to be "primarily interested" in such elections. In *Cipriano v. City of Houma*, 395 U.S. 701 (1969), the Court struck down a similar Louisiana constitutional provision that limited the franchise in municipal utility revenue bond elections to property taxpayers. In *Phoenix v. Kolodziejski, supra*, the Court struck down an Arizona law that similarly limited the franchise in local general obligation bond elections to property taxpayers. In striking down these provisions, the Court stated that citizens other than property taxpayers may well be interested in school elections and the issuance of bonds, see 396 U.S., at 632, 705, and 399 U.S., at 212, and therefore that the classifications in question did not serve the purpose of limiting the vote to interested classes of voters sufficiently to justify restrictions on the franchise. These decisions demonstrate clearly that the interest of property taxpayers in limiting governmental expenditures is not an interest which can justify restrictions on the franchise. In this connection, there surely is no difference between denial of the franchise altogether and the weighting of votes. The result would have been no different in *Kramer, Cipriano* and *Phoenix* if the State had given everyone one vote, and property taxpayers two. As stated in *Phoenix*, "[p]resumptively, when all citizens are affected in important ways by a governmental decision subject to a referendum, the Cons-

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[10] *Cipriano v. City of Houma, supra; Phoenix v. Kolodziejski, supra.*

titution does not permit weighted voting or the exclusion of otherwise qualified citizens from the franchise . . . . Placing [the power to approve or disapprove facilities which the local government has determined should be financed by issuing general obligation bonds] in property owners alone can be justified only by some overriding interest of those owners which the State is entitled to recognize." 399 U.S., at 209. Thus, under this Court's decisions, protecting property taxpayers from the improvidence of majorities is not a compelling state interest that can justify restrictions on the franchise. It cannot be claimed that such restrictions are necessary to promote a compelling state interest.

Moreover, even if the question were still open under this Court's decisions, the conclusion should be the same. We are aware of only two alleged justifications for extraordinary majority requirements with respect to bond and tax elections. First, petitioner suggests that such requirements serve to curb fiscal extravagance and thus contribute to "financial integrity." (*E.g.*, Pet. Br. p. 11.) Second, petitioner and the California Taxpayers Association both claim that such requirements protect "future majorities" with respect to the "irreversible" "assumption of financial burdens which bind all of the people for long future periods." (*E.g.*, Calif. Taxpayers Ass'n Br. p. 4.) However, neither alleged justification is sound; neither can support the claim that extraordinary majority requirements are necessary to promote a compelling state interest, or even that they are rationally founded upon a legitimate state objective.

1. Local Extravagance and Financial Integrity.

No one can quarrel with the claim that it is desirable for local governmental units to avoid imprudent and extravagant expenditures. However, extraordinary majority requirements contribute nothing to that objective, and clearly are not "necessary" to promote it. On the contrary, they often contribute to financial irresponsibility, rather than serving to curb it.

Extraordinary majority voting requirements for local bond issue elections were originally enacted in West Virginia and a number of other states in reaction to the serious depression that engulfed the country during the 1870's. Numerous local governmental units found themselves seriously overextended and defaulted on their bond issues, especially transportation bond issues. Advisory Commission on Intergovernmental Relations, State Constitutional and Statutory Restrictions on Local Government Debt (1961), pp. 19-20.

Since the 1870's, there have been major changes in local government financing which effectively discourage extravagant expenditures and preclude a repetition of the experience of the 1870's. A recent study of the Advisory Commission on Intergovernmental Relations mentioned three institutional developments which are relevant in this connection: "(1) A cadre of experienced and increasingly professional local finance persons has come into being . . . . (2) There has been a parallel development of principles, standards, systems and techniques for financial administration . . . . (3) The institutional system that now exists for informed and orderly marketing of local government securities . . . developed near the end of the 19th century and has since been greatly strengthened and refined . . . ." Advisory Commission Report, *supra*, at p. 22.

In addition, states have adopted a variety of genuinely effective measures to limit local public indebtedness and curb imprudent and extravagant expenditures, none of which requires invidious discrimination among voters.[11] For example, Article X, Section 8 of the West Virginia Constitution, which contains the 60 percent voting requirement, also imposes an absolute maximum limitation on debt. Even more important, it requires that counties, cities and school districts "provid[e] for the collection of a direct annual tax on all taxable property . . . separate and apart from

[11]Other restrictions are listed in the Advisory Commission Report, supra, at 27 and n. 26.

and in addition to all other taxes for all other purposes, sufficient to pay, annually, the interest on [any] debt, and the principal thereof," within 34 years. And the States that require that a referendum be held, but call for merely majority approval, insure that the proposed indebtedness will be subject to a popular, as well as a legislative, judgment. One commentary has suggested an additional control which might be used if necessary—"a state-level commission to review and approve [and possibly to underwrite] local proposals for new bond financing." Scott and Hamilton, *infra*, at 5-6. As noted above, none of these deterrents to unnecessary and unwise borrowing requires invidious discrimination among voters.

As a consequence of these institutional changes in the issuance and marketing of local governmental securities and the development of effective means to assure fiscal "integrity," bonds of local governmental units backed by the taxing power are unusually secure investments today, as everyone knows. Defaults are virtually unknown, and the market for such securities is stable. This increased stability is not limited to those states that have imposed extraordinary majority requirements. Rather, it is characteristic also of bonds issued in the 33 states that have no extraordinary majority requirements applicable to the kinds of measures involved in this case. See *Westbrook v. Mihaly*, *supra*, App. B-34, *infra*; Scott and Hamilton, *Extraordinary Majority Voting Requirements*, 10 Pub. Affairs Report, No. 4 (Univ. of Calif., Institute of Governmental Studies, Aug. 1969), p. 2. Our research has led us to conclude that no correlation *has ever been shown* between the most readily accessible indicator of the quality of government bonds—their ratings by the various services—and the presence or absence of such requirements.

Thus, the claim that extraordinary majority requirements contribute to financial "integrity," to use petitioner's phrase, appears to be unfounded. At *best*, such requirements are a neutral factor, and the available evidence indi-

cates that they may actually contribute to financial irresponsibility, as a consequence of unanticipated side effects of the imposition of such requirements. Thus, in order to avoid these and similar restrictions, local officials have made constantly increasing use of nonguaranteed debt or so-called "revenue bonds" which in many states are not subject to referendum requirements. See, *e.g.*, Advisory Commission Report, *supra*, at 53-54; Mitchell, W.E., *The Effect of Debt Limit on State and Local Government Borrowing*, N.Y.U. Inst. of Finance Bulletin, No. 45, Oct. 1967. Because this type of bond is not backed by the full faith and credit of the issuing entity, the local authorities often must increase the interest rates and terms in order to make them more marketable. Mitchell, *The Effect of Debt Limit*, *supra*. Obviously, this increased cost is passed on to the local residents.

Moreover, referendum requirements, particularly those requiring substantial super-majorities, are also circumvented in some states by the establishment of frequently overlapping "special district" governments not subject to such requirements. In some states, these "special districts" are created to issue revenue bonds, construct needed facilities, and lease the facilities to governmental units that would be subject to referendum and super-majority requirements if they undertook to build the facilities themselves. In others, they are employed to enlarge the borrowing capacity of a given geographical area under legal limitations like those involved in this case. As the Advisory Commission Report points out, the proliferation of special districts caused by these restrictions "is often a handicap not only to consistent planning and administration but also to citizen understanding and control of local government as a whole." Advisory Commission Report, *supra*, at 58.

Thus, far from contributing to financial rectitude—to financial "responsibility" and "integrity"—the extraordinary majority requirements contribute to the development of jerrybuilt financial vehicles and arrangements—to fiscal *irre-*

sponsibility. In any event, "the diversion of local borrowing into novel, more costly financing methods which often entirely evade submission to elections, renders any claim that the [extraordinary majority] requirement insures sound fiscal policy and popular control of long-term borrowing highly dubious at best." *Westbrook v. Mihaly, supra*, p. B. 38, *infra*.

2. Future Majorities

The argument that supermajority requirements are necessary to protect future generations–tomorrow's "majorities"–against the improvidence of today's majorities has even less to commend it. The argument, as put by the California Taxpayers Association, is that "most action can be . . . amended or repealed by a majority if the action turns out to be unwise or its burdens too great. This is not true of bonds." (Calif. Taxpayers Ass'n. Br., p. 16.) Rather, the decision to incur indebtedness is said to be "irreversible." (Calif. Taxpayers Ass'n. Br., p. 3.) The Taxpayers Association does not say, however, how one goes about "amending or repealing" the consequences of deficient educations. If needed school bonds are approved, they must of course be paid. But if they are not approved, schools will not be built. It requires no great sophistication to recognize the "irreversible" consequences of inadequate educational facilities. As the California Supreme Court stated in *Westbrook v. Mihaly, supra*:

> " . . . We are told that long-term borrowing irrevocably commits the future revenues of a community and that such a drastic step should not be undertaken upon the will of a mere majority. However, many decisions of government at all levels are crucial and irreversible, yet this alone has never been thought a sufficient ground upon which to remove them from the democratic process. We are not persuaded that a decision to commit future tax revenues to the financing of projects whose scale and useful life make payment of their costs

from current revenues impracticable or inequitable is so unique or so fraught with peril that it warrants this deprivation of voting rights.

"We do not think respondents have demonstrated that bond-finance decisions are fundamentally different from many other political decisions made by a majority vote or by representatives elected by a majority vote. Even assuming, however, that respondents had done so we think their argument fails at another level. This justification for the extraordinary majority requirement rests on the premise that a decision to *undertake* a project such as the construction of schools and playgrounds is qualitatively different from a decision *not to* do so. This, in turn, is based on the assumption that spending money is a more serious matter than not spending it and, consequently, must be justified whereas frugality is self-justifying. A predisposition to thrift may serve a man well. It does not, however, justify governmental inertia, especially when government is faced with critical social problems demanding urgent and sometimes costly remedies. There is no presumption in favor of inaction, as the United States Supreme Court observed in *Avery v. Midland County, supra,* 390 U.S. 474, 484: '[W]e might point out that a decision not to exercise a function within [local government's] power—a decision, for example, not to build an airport or a library, or not to participate in the federal food stamp program—is just as much a decision affecting all citizens . . . as an affirmative decision.'" (App. B 39-40, *infra*).

Moreover, even if there were any substance to the "future majorities" argument with respect to bond proposals, this case also involves the application of an extraordinary majority requirement to a proposal to levy *current taxes to meet current educational needs.* The "future majorities" argument has no relevance whatever to such a proposal.

3. Analogies to Other Supermajority Requirements

Finally, it should go without saying that a decison with respect to the necessity or rationality of alleged justifications for extraordinary majority requirements applicable to bond and tax proposals will have no application to extraordinary majority requirements applicable to other kinds of decisions left to the voters. *E.g.*, see *Rimarcik v. Johansen*, No. 147, 1970 Term (extraordinary majority requirement applicable to amendments to local liquor control laws). As stated by the California court in *Westbrook v. Mihaly, supra*,

> "Respondents press a final argument upon us. They point out that the extraordinary majority requirement of article XI, section 18, is not unique and that there are many contexts in which governmental action is conditioned upon the ability of its proponents to secure the support of more than a bare majority . . . . They then admonish us that, *since the two-thirds requirement* cannot be distinguished from any of these provisions, a decision invalidating it will inevitably undermine the constitutionality of all. We cannot agree.
>
> "First, there is no merit to the attempt to analogise section 18 to institutional arrangements of varied historical origin and specialized function, such as the electoral college, the allocation of two senate seats to each state regardless of population, or the unanimous jury verdict required for a criminal conviction. Efforts to justify state-imposed inequalities in voting power through reliance on analogies to other distinct institutions have met with no success in the United States Supreme Court. For example, in *Gray v. Sanders, supra*, 372 U.S. 368, 378, the court declared: 'We think the analogies to the electoral college, to districting and redistricting, and to other phases of the problems of representation in state or federal legislatures or conventions are inapposite. The inclusion of the electoral college in the Constitution, as the result of specific historic concerns, validated the collegiate principle despite

its inherent numerical inequality, but implied nothing about the use of an analogous system by a State . . . .' (Fns. omitted.) In *Reynolds v. Sims, supra,* 377 U.S. 533, 573, the court observed that: 'Attempted reliance on the federal analogy appears often to be little more than an after-the-fact rationalization offered in defense of maladjusted state apportionment arrangements.' Our reaction to analogies to, for example, the treaty ratification procedure in the United States Senate is not dissimilar.

"Second, many of the extraordinary majority provisions to which we are referred are readily distinguishable in that, since they apply solely to the internal procedures of legislative bodies, they involve no dilution of the individual exercise of the franchise which is in issue here. Some, such as the two-thirds required for conviction of impeachment (U. S. Const., art. I, § 3) or expulsion from Congress (U.S. Const., art. I, § 5) are designed to avoid precipitate action in areas of particular importance or sensitivety. Others, such as the two-thirds required to override a presidential (U.S. Const., art. I. § 7) or gubernatorial (Cal. Const., art. IV, § 10(a)) veto or the two-thirds required to ratify a treaty (U.S. Const., art. II, § 2) represent those basic allocations of power between branches of government which are at the heart of that great system of 'checks and balances' established by the founding fathers. In neither case is there any infringement of the individual citizen's right to vote such as that effected by section 18.

"Finally, those extraordinary majority vote requirements which do apply outside the legislative process are by no means uniformly invalidated by our decision today. We emphasize that while it has not been demonstrated that a two-thirds vote requirement for approval of local general obligation bonds is necessary to promote a compelling state interest, similar provisions in other contexts may meet this standard. For example, it is common to

> insist upon a broad consensus before altering basic political documents. (See, e.g., U.S. Const., art. V.) Documents such as constitutions exist partly to provide continuity and stability to the affairs of state. This is a goal of fundamental importance and one which can be achieved only by protecting such charters from the will of temporary majorities. We see no *a priori* reason to assume that other extraordinary majority provisions cannot be shown to be necessary to attain 'compelling' ends. Each must be judged on its particular facts. Those which serve no such end will fall, but our decision today commits us to no wholesale elimination of such laws. We, of course, express no opinion as to the validity of any of the foregoing provisions."

In sum, West Virginia's extraordinary majority requirements serve no rational, valid state purpose, and clearly are not "necessary to promote a compelling state interest." Accordingly, by whatever standard they are tested, they are unconstitutional under the Equal Protection Clause.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Appeals of the State of West Virginia should be affirmed.

Respectfully submitted,

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APPENDIX A

Table 1
*Assessed Valuation of West Virginia Counties, 1969

Counties	Total Assessed Valuation (All Properties)
1. Kanawha	$1,058,438,000
2. Cabell	438,844,740
3. Wood	267,710,260
4. Ohio	256,066,300
5. Harrison	235,964,880
6. Hancock	215,522,350
7. Monongalia	203,753,570
8. Marion	194,708,033
9. Mercer	170,890,640
10. Raleigh	165,488,250
11. Marshall	150,696,950
12. McDowell	133,840,490
13. Fayette	133,757,210
14. Berkeley	166,182,755
15. Wayne	110,056,210
16. Brooke	109,852,200
17. Logan	102,776,600
18. Jackson	100,102,980
19. Greenbrier	97,807,265
20. Wyoming	90,435,550
21. Mason	89,103,210
22. Mingo	88,629,800
23. Preston	78,344,675
24. Putnam	76,974,421
25. Lewis	75,262,940
26. Randolph	74,589,695
27. Jefferson	72,867,345
28. Boone	68,472,825

*Source - West Virginia Tax Commissioner, Report of Classified Assessed Valuation 1969

29. Wetzel	64,744,780
30. Upshur	56,759,175
31. Nicholas	56,027,400
32. Mineral	54,881,770
33. Grant	53,596,190
34. Roane	45,751,560
35. Hampshire	41,783,294
36. Lincoln	37,143,255
37. Summers	36,785,290
38. Taylor	36,523,190
39. Barbour	35,844,415
40. Ritchie	33,339,050
41. Braxton	33,147,893
42. Hardy	33,083,380
43. Gilmer	32,085,460
44. Pleasants	31,588,830
45. Daddridge	30,364,020
46. Tyler	30,062,750
47. Morgan	28,357,140
48. Pocahontas	28,099,570
49. Monroe	26,520,035
50. Webster	26,040,550
51. Calhoun	23,262,655
52. Pendleton	21,044,170
53. Clay	20,851,750
54. Tucker	17,891,290
55. Wirt	10,467,290
	$5,923,216,926

Table 2

*Per Capita Personal Income of
West Virginia Counties, 1966

1. Ohio	$2,891
2. Jackson	2,862
3. Hancock	2,818
4. Morgan	2,652
5. Marshall	2,636
6. Jefferson	2,618
7. Monongalia	2,597
8. Hardy	2,594
9. Marion	2,560
10. Wetzel	2,509
11. Grant	2,480
12. Kanawha	2,400
13. Harrison	2,383
14. Cabell	2,370
15. Barbour	2,260
Raleigh	2,260
17. Berkeley	2,240
18. Logan	2,190
WEST VIRGINIA	2,176
19. Wood	2,162
20. Fayette	2,123
21. Greenbrier	2,095
22. Pleasants	2,065
23. Pendleton	2,061
24. Pocahontas	2,053
25. Brooke	2,046

*Source: West Virginia Educational Association, Rankings of the Counties 1968.

26.	Mason	2,032
27.	Hampshire	1,992
28.	Boone	1,961
29.	Ritchie	1,956
30.	Webster	1,947
31.	Tucker	1,944
32.	Doddridge	1,924
33.	Nicholas	1,912
34.	Braxton	1,893
35.	Mineral	1,892
36.	Randolph	1,854
37.	Mercer	1,847
38.	Roane	1,830
39.	Putnam	1,817
	Gilmer	1,768
41.	Preston	1,768
42.	Taylor	1,759
43.	McDowell	1,730
44.	Summers	1,720
45.	Upshur	1,693
46.	Wyoming	1,689
47.	Monroe	1,669
48.	Calhoun	1,628
49.	Tyler	1,624
50.	Mingo	1,583
51.	Wayne	1,563
52.	Wirt	1,557
53.	Clay	1,547
54.	Lewis	1,489
55.	Lincoln	1,236

Table 3

*Actual Per Pupil Expenditures of West Virginia Counties 1967-68

Barbour	$509.85	Monongalia	$565.78
Berkeley	465.49	Monroe	531.99
Boone	520.08	Morgan	538.02
Braxton	545.53	McDowell	540.84
Brooke	613.31	Nicholas	463.34
Cabell	632.05	Ohio	664.77
Calhoun	543.39	Pendleton	550.16
Clay	516.95	Pleasants	671.96
Doddridge	550.54	Pocahontas	602.45
Fayette	549.60	Preston	521.29
Gilmer	601.41	Putnam	553.80
Grant	594.53	Raleigh	542.70
Greenbrier	448.15	Randolph	457.68
Hampshire	534.20	Ritchie	572.51
Hancock	796.50	Roane	509.77
Hardy	530.25	Summers	514.46
Harrison	503.41	Taylor	489.91
Jackson	471.62	Tucker	497.81
Jefferson	558.55	Tyler	502.88
Kanawha	602.03	Upshur	513.74
Lewis	552.59	Wayne	599.61
Lincoln	572.37	Webster	573.84
Logan	535.42	Wirt	568.85
Marion	494.64	Wood	585.56
Marshall	718.35	Wyoming	535.46
Mason	677.61		
Mercer	587.96	State Average	564.13
Mineral	517.77		
Mingo	496.01	**National Average	680.00

*Source: West Virginia Board of School Finance. *The School Dollar*. February 1969.

**Source: National Education Association Research Division, *Rankings of the States*, 1969.

Table 4

Special Bond and Excess Levy Elections
Roane County 1960 - 1968*

Date	Purpose	For	Against	Percent For
12-9-60	$180,000 Excess Levies ($50,000 salaries; $130,000 capital improvements)	1,219	2,802	30.31%
11-64	$245,000 Excess Levies ($120,000 salaries, books and transportation; $125,000 capital improvements)	3,833	3,031	55.84%
2-19-65	$203,000 Excess Levies ($73,000 salaries and transportation; $130,000 capital improvements)	2,215	2,003	52.51%
3-22-68	$1,830,000 bonds for capital improvements	2,646	2,181	54.81%
3-22-68	$156,000 Excess Levies ($119,000 salaries and transportation; $62,000 capital improvements)	2,618	2,185	54.50%
4-29-68	$1,830,000 bonds for capital improvements	2,887	2,713	51.55%
4-29-68	$156,000 Excess Levies ($119,000 salaries and transportation; $62,000 capital improvements)	2,866	2,697	51.51%

*Source: Complaint, Exhibit B.

Table 5

States That Require Extraordinary Majorities In Local Elections Relating to School Bonds and Increased Tax Levies For Educational Purposes

State	Percentage Requirement	Application	Citations
Alabama	60	Special County School Tax	Ala. Const. art XIV, §269
California	66 2/3	All bonded indebtedness	Cal. Const. art. XI, §18
Idaho	66 2/3	All bonded indebtedness; Tax Levies above a stated maximum level	Idaho Const. art. VIII, §3, Idaho Code §§33-802, 1102-04
Iowa	60	All bonded indebtedness	Iowa Code Ann. Title IV, §75.1, Title XII, §274.2
Kentucky	66 2/3	All bonded indebtedness	Ky. Const. §§157; Ky. Rev. Stat. §§162.080, 162.090, 162.100
Massachusetts	66 2/3	All bonded indebtedness	Mass. Code Ann. Ch. 44 §9
Mississippi	60	All bonded indebtedness	Miss. Code Ann. §§6532-04, 6532-07
Missouri	66 2/3	All bonded indebtedness; Tax Levies above a stated maximum level	Mo. Const. art. VI, § 26(b), art. XI, § 11(c); Mo. Code § 164.151
Nebraska	55	All bonded indebtedness; Tax Levies above a stated maximum level in certain classes of school districts	Neb. Rev. Stat. §§10-701, 702-04, 79-432
New Hampshire	66 2/3	All bonded indebtedness*	N.H. Rev. Stats., §33-8
New York	66 2/3	All bonded indebtedness incurred by districts other than city school districts	N.Y. Const., art. VIII, § 4; N.Y. Local Finance Law §104.00

*This requirement does not apply to 9 cities where bonds may be issued by the city council.

	60	All bonded indebtedness incurred by districts in cities with a population under 125,000 (Cities with a higher population cannot exceed constitutional debt limits'	Id.
		Tax Levies above a stated minimum level for school districts coterminus with or partly or wholly in a city of less than 125, 000 pop.	N.Y. Const., Art. VIII, § 10
North Dakota	60	All bonded indebtedness; Tax Levies which are 25-75% above the stated maximum limit	N.D. Code §§ 21-03-07, 57-16-02, 57-16-05
Oklahoma	60	All bonded indebtedness	Okla. Const. art. X, § 26; Okla. Stats. Ann. § 70-15-3
South Dakota	60	All bonded indebtedness	So. Dak. Comp. L. § 9-26-1
Texas	66 2/3	Special County Tax Levy	Tex. Civ. Stat. art. 7048
Washington	60**	All bonded indebtedness; Tax Levies exceeding 40 mills on the dollar of assessed valuation	Wash. Const. art. VIII, § 6, amend. 27, art. VII, sec. 2, amend. 17; Wash. Rev. Code §§ 39. 36.020, 84.52.056
West Virginia	60	All bonded indebtedness; Tax Levies above a stated maximum level	W. Va. Const. art. X, §§ 1, 8, 10; W. Va. Code §§ 13-1-4, 13-1-14

**The total number of votes cast must be at least 40 per cent of the total vote in the last preceding general election.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

ELOUISE WESTBROOK, et al.,

Petitioners,

v. SF 22706

EMMERY MIHALY, as Registrar of Voters, etc., et al.,
Respondents.

STEPHEN ADAMS,

Petitioners,

v. SF 22707

EMMERY MIHALY, as Registrar of Voters, etc., et al.,

Respondents

[OPINION OF THE COURT*]

We are presented in these cases with a common issue: whether that portion of article XI, section 18 of the California Constitution which requires that general obligation bond proposals of counties, cities and school districts be approved by a two-thirds majority of the voters in a popular referendum violates the equal protection clause of the Fourteenth Amendment to the United States Constitution. Section 18 provides, in relevant part, "No county, city, town, township, board of education, or school district, shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the

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*The companion opinions of the California Supreme Court in *Alhambra City School District v. Mize, Larez v. Shannon,* and *Foytik v. Aronson* are reported at 87 Cal. Rptr. 867-873, 471 P.2d 515-523 (1970).

qualified electors thereof, voting at an election to be held for that purpose, . . ."[1]

Two bond issue proposals were submitted to the voters of San Francisco at a special election held in November 1969. Proposition "A" sought authorization for the City and County of San Francisco[2] to incur a bonded indebtedness of $9,998,000 for additions to and improvements of its park and recreation system. Proposition "B" sought authorization for a bonded indebtedness in the amount of $5,000,000 to provide new elementary schools and to modernize existing school facilities in the Hunters Point area of the city. Both propositions received the approval of a majority of the voters but less than the two-thirds required by article XI, section 18.[3]

Petitioners in S.F. 22706 are residents of and registered voters in San Francisco. Some of them are property owners; others are parents of children attending public schools in the Hunters Point neighborhood. All voted in favor of both

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[1] Towns and townships do not exist as local governmental units in California and boards of education are simply the governing bodies of school districts. (See Cal. Const. Revision Com., Background Study, Article XI: Local Government, p. 363.) Thus section 18 effectively applies only to counties, cities, and school districts, which are, however, the basic units of local government in the state.

In addition to requiring extraordinary majority voter approval, section 18 provides, as a condition to the incurring of long-term debt, that "provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also provision to constitute a sinking fund for the payment of the principal thereof, . . ." The maximum term of such indebtedness is fixed at 40 years. Petitioners do not challenge these regulations of local borrowing.

[2] San Francisco is a consolidated city and county. It is subject to the provisions of section 18 by virtue of article XI, section 7 of the California Constitution.

[3] Proposition "A" received the affirmative votes of 56.8 percent of those voting on the proposition; Proposition "B" received the support of 52.3 percent of those so voting.

Proposition "A" and Proposition "B." Petitioner in S.F. 22707 is a resident of and registered voter in San Francisco who also voted in favor of both propositions. Respondents in both cases are various officials of the city and county who are charged with certain duties in connection with municipal bond elections.[4] Through their respective attorneys, petitioners demanded of respondents that they certify both propositions as having been approved by the voters and that they take all further steps necessary to offer the bonds for sale. Respondents refused, taking the position that, since neither proposition had received the assent of two-thirds of the voters as required by article XI, section 18, they had no duties to perform in connection therewith other than that of certifying the actual results of the election to the San Francisco Board of Supervisors.

Petitioners then commenced these proceedings contending that the two-thirds vote requirement, by giving to each negative voter twice the voting power of each affirmative voter, substantially diminishes the effect of the votes of all persons who, like petitioners, favor passage of propositions authorizing the incurring of bonded indebtedness. Such "dilution" of voting power, it is claimed, denies their right to the equal protection of the laws. Invoking our original jurisdiction (Cal. Const., art. VI, § 10), petitioners in each case seek: (1) a declaration that article XI, section 18 of the state Constitution, insofar as it requires a two-thirds rather than a simple mathematical majority to approve the incurring of bonded indebtedness, is invalid under the Fourteenth Amendment to the United States Constitution; and (2) a peremptory writ of mandate commanding respondents to certify that the propositions at issue herein were duly approved and authorized by the qualified voters of the City and County of San Francisco and to proceed with all actions

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[4] Respondent Mihaly is the registrar of voters, respondent Dolan the clerk of the board of supervisors, and respondent Cooper the controller, of the City and County of San Francisco.

necessary to offer the bonds for sale. We issued alternative writs of mandate. Respondents have made returns thereto by demurrer and answer. (Code Civ. Proc., § 1089; Cal. Rules of Court, rule 56(c).) By issuing the alternative writs we have necessarily determined that there is no adequate remedy in the ordinary course of law and that each case is a proper one for the exercise of our original jurisdiction. (County of Sacramento v. Hichman (1967) 66 Cal.2d 841, 845; see Cal. Rules of Court, rule 56(a).

This court has considered the scope and applicability of article XI, section 18 on several occasions since it became a part of our state Constitution in 1879. In this case, however, we face for the first time a challenge to the provision on federal constitutional grounds. When, as here, a state law is claimed to violate the equal protection clause, we must consider "the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification." (Fn. omitted.) (Williams v. Rhodes (1968) 393 U.S. 23, 30.) We begin with a synopsis of the events leading up to the adoption of the challenged provision.

The California Constitution of 1849 contained no debt limits applicable to cities or other local governmental units. However, it did require that any state indebtedness in excess of $300,000 be approved by a majority of the voters in a statewide referendum (Cal. Const. of 1849, art. VIII)[5] and

[5]The substance of the provision is retained in the present article XVI, section 1. During the early part of the Nineteenth Century, the eastern states borrowed heavily to finance capital improvements such as railroads, turnpikes, and canals. These ventures ended in financial disaster in 1837. "The midwestern states went through a similar cycle . . . two decades later. Unable to meet their obligations, the states wound up these enterprises with great financial loss. Such . . . experiences led either to the abolition of the power to borrow for state improvements in the state legislature . . . or to the introduction of various spending and financial restrictions in the state constitution." (Fn. omitted.) (L. Chermak, The Law of Revenue Bonds (1954), p. 53.)

authorized the state Legislature to organize cities and restrict their powers of ". . . borrowing money, contracting debts, and loaning their credit, so as to prevent abuses . . . ." (Cal. Const. of 1849, art. IV, § 37.) The Legislature, however, exercised this power only sporadically and such restrictions

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The constitutional limit on state debt incurred without the approval of a popular majority came before this court in *People v. Johnson* (1856) 6 Cal. 499. We set forth at some length the opinion of Chief Justice Murray not simply for its description of the period but because it is a revealing example of the profound, moral reaction against financial extravagance on the part of government. He observed: "The framers of our State Constitution were mostly men fresh in the experience of the errors which other States had fallen. They had witnessed the unhappy results that followed extravagant legislation, and were anxious to rear a bulwark here, which would protect us against similar disasters. They were thoroughly acquainted with the history of the gigantic schemes of internal improvements entered into by the South and West; of the establishment of banks; of the expansion of their circulating medium; of the inflation of everything; of the general demoralization, which resulted from an uncontrolled power of legislation; and, in fact, of the weakness of human nature itself. They had witnessed ruin like an avalanche overwhelm them, destroying visionary hopes of wealth and greatness, and leaving them to sink beneath the crushing weight of debt and taxation, or driving them to the more dishonorable alternative of repudiation . . . .

"With these examples before them, in a country whose very atmosphere was heavy with gold, . . . can it be wondered that the framers of our Constitution should have attempted to prevent the evil consequences which they foresaw, by constitutional checks and barriers? No one can doubt their intention, and it is only to be regretted that that which was so wisely begun, has been so rashly departed from. . . .

"If we were at liberty to decide this case on grounds of public policy, we could not hesitate one moment between bankruptcy and ruin, or credit and prosperity. It is time that the axe should be laid at the root of this political evil; that this system of extravagance, which has been the curse of the State for the last five years, . . . should be stopped; and that honesty, prudence and economy should preside over the legislation of the State, and the administration of her financial affairs." (6 Cal. 499, 503-505.)

on municipal indebtedness as did exist were contained in the charters of individual cities rather than in general laws.[6] Indeed, state regulation typically took the form of numerous special acts authorizing particular cities to incur specific indebtedness, often in total disregard of the local charter restrictions.[7] In California, as elsewhere, municipal debt increased dramatically.[8]

The bubble burst in the 1870's as California followed the rest of the nation into a severe financial depression. Banks collapsed, the securities markets declined, municipalities defaulted on their bonds, businesses closed and trade stagnated.[9]

[6] Restrictions varied from outright prohibition to authority to borrow without limit. Twenty-six out of sixty-eight charter cities required elections to incur certain types of indebtedness but only four required extraordinary majorities. (Starner, General Obligation Bond Financing by Local Governments: A Survey of State Controls (Univ. of Cal., Bureau of Public Administration 1961) p. 7.)

[7] One commentator has noted that "Much of the over-extended municipal debt of the mid-Nineteenth Century stemmed from the excessive zeal of local communities for transportation links, particularly for rail development." (Starner, *op. cit. supra*, at p. 7.) An example of this, and of the state Legislature's casualness in acceding to demands for special legislation, was an act passed in 1866 authorizing the City of Petaluma to issue $500,000 in bonds to construct locks, dams, and canals on the Petaluma Creek and to collect tolls from the vessels which, it was anticipated, would use the network. (See Beebe, et al., *Joint Powers Authority Revenue Bonds* (1968) 41 So. Cal. L. Rev. 19, 24.) Unsuccessful ventures such as this were among the "abuses" referred to in article IV, section 37 of the 1849 Constitution.

[8] "With the Federal Government remaining impotent and the state governments restricting their public works activities, the burden of furnishing internal improvements . . . fell upon the local governments and private enterprise. Municipal debt rose from $20,000,000 in 1840 to $200,000,000 in 1860, being used primarily for the financing of the paving and sewering of streets, the constructing of water supply systems, and the making of railroad stock subscriptions. When the crisis of 1873-1874 found municipal debt vastly in excess of state debt, constitutional and statutory restrictions upon municipal borrowing were adopted . . . ." (Chermak, *op. cit. supra*, at pp. 53-54).

[9] D. Fehrenbacher, A Basic History of California (1964) at page 48.

As foreclosures and unemployment mounted, thousands drifted from the farms to the cities vainly seeking work.[10] The general mood was one of disillusionment and anger and the state was swept by radical political movements. It was thus in an atmosphere of economic and political crisis that the delegates to the Constitutional Convention set to work in 1878.[11]

A combination of state and local mismanagement, aggravated by the depression, had created widespread concern over excessive municipal indebtedness and the processes of local debt formation.[12] Popular dissatisfaction had begun to focus on the special legislation authorizing local indebtedness since it was felt that this gave undue influence to narrow interest groups seeking public financing of projects from which they would reap disproportionate benefits. The practice was considered to be a major cause of the inordinate mass of debt with which many communities were burdened.[13] It is, therefore, not surprising that when the

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[10]R. Roske, Every Man's Eden: A History of California (1968) pp. 378-379. There were 10,000 workingmen unemployed in San Francisco alone which, at that time, was a city of only 165,000.

[11]Mr. O'Donnell, a delegate from San Francisco and a member of the Workingmen's Party, described the social conditions which had led to the calling of the convention: "The people were suffering great social and political wrongs. There was sloth in the mart and schism in the temple; corruption in office and out of it. Murmurs of discontent arose among the people . . . ." (1 Debates and Proceedings of the Constitutional Convention, p. 17.) Colonel Hoge, a representative of a more moderate faction, who was elected president of the convention, was less rhetorical but hardly more sanguine: "We have met, gentlemen, at not the most favorable time for making a Constitution. For many causes there seems to be very great depression in the business and industrial enterprises of the country. To some extent we have fallen upon evil times . . . ." (*Id.* at p. 22.)

[12]Scott and Hamilton, Extraordinary Majority Voting Requirements, 10 Public Affairs Report No. 4 (Univ. of Cal., Institute of Governmental Studies, Aug. 1969), p. 2.

[13]Starner, *op. cit. supra*, at p. 6.

delegates confronted the problem of regulating municipal indebtedness, one of their solutions was to strip the state Legislature of any role in its creation. This, inter alia, was accomplished by the absolute ban on special legislation contained in article IV, section 25 of the new Constitution.[14]

Article XI, section 18, however, provided the principal instrument for the control of local borrowing. It is apparent, from a reading of the section, that one of its purposes was to establish the "pay as you go" principle as a cardinal rule of municipal finance. Accordingly, the section requires each year's expenditures to be satisfied from the income of that year, thus preventing a gradual year-by-year amassment of liabilities. As a result, the actual cost of municipal government is more closely reflected in the tax rate and the citizens are better able to make informed judgments on the performance of their elected officials. San Francisco Gas Co. v. Brickwedel (1882) 62 Cal. 641, the first case in which this court considered article XI, section 18, mentioned only this "pay as you go" restriction[15] of the section, which it termed a "radical change" from previous conditions. This restriction is manifestly distinct from that portion of the section which establishes the percentage of voter approval requisite to authorize indebtedness in excess of current revenues.

It is also apparent that article XI, section 18 was intended to compel local legislative bodies to inform the public of projects necessitating long-term expenditures and to give to the people the ultimate power of approving or rejecting them. However, we have been unable to discover from the records of the Constitutional Convention or from contemporary judicial opinions, why a two-thirds vote requirement, rather

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[14]The provision is now contained in article IV, section 16.

[15]We refer to the following language of section 18: "No county, . . . shall incur any indebtedness or liability . . . *exceeding in any year the income and revenue provided for such year*, . . ." (Italics added.)

than that of a simple majority, was adopted.[16] It may have been seen as a method by which most long-term indebtedness could be entirely prevented. (See Starner, *op. cit. supra*, at p. 7.) It may have been designed to protect property owners from the unrestrained desires of the landless for

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[16]Much of the recorded debate concerns the necessity and advisability of placing a maximum limit on local indebtedness. Proposals to accomplish this were introduced and a limit was included in initial drafts of section 18. Discussion on the floor centered on whether this limit should be expressed (as it was in the drafts) in the form of a ratio of debt to assessed value of taxable property, what the optimal debt to property ratio would be, whether certain types of projects should be exempted because of their social value and, if so, which types. Ultimately, no maximum limit was adopted, reliance apparently being placed on the other curbs on the incurring of debt. (2 Debates and Proceedings of the Constitutional Convention, *supra*, pp. 1068-1071; 3 Debates and Proceedings of the Constitutional Convention, *supra*, pp. 1381-1383.)

Nor do our cases shed any light on the purpose intended to be achieved by the two-thirds vote requirement. Two of the earliest cases, San Francisco Gas Co. v. Brickwedel, *supra*, 62 Cal. 641 and McBean v. City of Fresno (1896) 112 Cal. 159, discuss only the "pay as you go" aspect of the constitutional provision. City of Redondo Beach v. Taxpayers, Property Owners, Etc., City of Redondo Beach (1960) 54 Cal.2d 126 does assign a purpose to the section as a whole but does not purport to explain the choice of a two-thirds majority: "The purpose . . . is to safeguard the general funds and property of a municipality from a situation whereby the holders of an issue of bonds could, at some time after the issuance thereof, force an unconsented-to increase in the taxes of, or foreclose on the general assets and property of the issuing public corporation . . . ." (54 Cal.2d at p. 131.) This statement does not indicate what the relation between this purpose and an extraordinary majority vote requirement is, or was intended to be. Finally, while City of Palm Springs v. Ringwald (1959) 52 Cal.2d 620, does address itself to that portion of section 18 which requires a referendum, the case states only that it "is designed to afford the people who are required to pay the cost of providing such objects of public convenience and welfare an opportunity to express their approval or disapproval of a long-term indebtedness." (52 Cal.2d at p. 627.) This is hardly a satisfactory explanation for the two-thirds requirement, since the assigned purpose would be served equally well by a mandatory referendum whose outcome is determined by a simple majority vote.

publicly financed projects. It may have reflected an unarticulated premise that only those proposals which could command such substantial consensus *should* be undertaken. It would be mere speculation on this record to designate one purpose as that for which the two-thirds figure was selected. There is, of course, no evidence indicating that the requirement was designed as a subterfuge for discriminating against the interests of racial, national or religious minorities. This, however, is by no means the end of our inquiry.

Nor do we consider this matter concluded by any of the cases from this and other jurisdictions to which respondents have referred us. While the cited cases rejected various attacks on state debt limitations, none has decided the question here presented.

Finally, we do not believe that, because an equal protection argument was not made by any of the parties in the cases upholding debt limitations, a challenge to article XI, section 18 on those grounds lacks merit today. It is not surprising that there was apparently no discussion of the possible conflict between a two-thirds vote requirement and the equal protection clause during the Constitutional Convention. Nor is it remarkable that the provision was not assailed on these grounds in the courts. The period in which section 18 was adopted was not greatly concerned about inequalities in the electoral process.[17] For example, even though the Fifteenth Amendment, forbidding denial or abridgement of the right to vote on racial grounds, had been ratified only eight years earlier, most of the delegates to the Constitutional Convention believed that Californians of Chinese ancestry should not be permitted to vote and only grudgingly limited the exclusion to "natives of China." (Gaylord, "History of the California Election Laws," West's Election Code, p. 41.) Much water has gone under the

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[17]Thirty years were still to elapse before the Seventeenth Amendment sanctioned popular election of United States Senators, and it would be forty years until the Nineteenth Amendment extended the franchise to women.

bridge since the 1870's and we may not resolve this problem by applying the standards of that era. (See, e.g., Brown v. Board of Education (1954) 347 U.S. 483, 492.) "Our understanding and conception of the rights guaranteed to the people by the 'stately admonitions' of the Fourteenth Amendment have deepened, and have resulted in a series of decisions, enriching the quality of our democracy, which certainly do not codify State's rights, governmental theories or conceptions of human liberties" as they existed in the Nineteenth Century. (Fn. omitted.) (Fortson v. Morris (1966) 385 U.S. 231, 247; Fortas, J. dissenting.) Our task is to decide whether "the challenged provision is compatible with the demands of equal protection as they apply in contemporary society." (Castro v. State of California (1970) 2 Cal.3d 223, 231.) This means, since "notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change" (Harper v. Virginia Bd. of Elections (1966) 383 U.S. 663, 669), that the constitutionality of article XI, section 18 must be determined not only in light of the need for and effect of the provision under present conditions, but also in light of the greatly expanded protection we have afforded to the right to vote.

More than any decade since that immediately following the Civil War, the 1960's were a time of struggle to transform America's ancient promise of political equality into a reality. Ten years ago many of our citizens were barred from the polls for reasons related to their race, economic status or national background. Others, because of extreme disparities in population among electoral districts, were denied equal representation in Congress, in state legislatures, and in units of local government. Much of this has been changed, some by federal legislation[18] and some by constitutional amendment.[19] But the significant and stirring

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[18]See, e.g., The Voting Rights Act of 1965, 42 U.S.C.A. section 1971, et seq.

[19]United States Constitution, Amendment XXIV.

reforms have been effectuated by the United States Supreme Court which has insisted that our political structures and practices, no matter how venerable their origin, comport with the Fourteenth Amendment.

The court has entered the "political thicket" (Colegrove v. Green (1946) 328 U.S. 549, 556) to enforce the equal protection clause in three principal contexts. The first such category is composed of cases involving state laws that exclude various groups from voting in all or in certain types of elections. The court has eliminated many of these barriers to the electoral process; it has invalidated residency requirements excluding servicemen,[20] qualifying examinations excluding racial minorities,[21] poll taxes, excluding the poor and indigent,[22] and property qualifications excluding the landless.[23] The effect of these, and of related decisions,[24] has been to expand sharply the number of persons entitled to participate actively in the election process. This court,

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[20]Carrington v. Rash (1965) 380 U.S. 89, held unconstitutional a Texas law which barred all servicemen who had moved to Texas during their military service from voting in any state election.

[21]United States v. Louisiana (1965) 380 U.S. 145, banned the employment of voter qualification examinations with such discretionary standards as to permit their use as deliberate devices for racially motivated exclusions.

[22]Harper v. Virginia Bd. of Elections, *supra*, 383 U.S. 663, invalidated state laws requiring the payment of poll taxes as a condition to voting in state elections.

[23]Kramer v. Union School District (1969) 395 U.S. 621, held that local school district elections could not, consistent with the equal protection clause, be limited to parents of school children, property owners and lessees of real property. Cipriano v. City of Houma (1969) 395 U.S. 701, struck down a Louisiana statute confining the right to vote in municipal utility revenue bond elections to property taxpayers.

[24]See, e.g., Katzenbach v. Morgan (1966) 384 U.S. 641, which upheld section 4(e) of the Voting Rights Act of 1965, invalidating state English literacy requirements as applied to certain foreign language literates.

for example, complying with principles established by the above line of cases, has limited the application of two voter qualification provisions contained in our state Constitution.[25]

The second major area in which the high court has intervened involves state geographical districting systems which dilute the effectiveness of the franchise either directly or through the allocation of legislative representation. In order to insure that voting power remains precisely correlated with population, the court has abolished electoral systems which weighted votes in elections for statewide office;[26] it has ordered that the districting of federal congressional seats[27] and the apportionment of both houses of state legislatures[28]

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[25]See Otsuka v. Hite (1966) 64 Cal.2d 596, holding that the exclusion of those convicted of "infamous crimes" (Cal. Const., art. II, § 1) could not extend to all felons; Castro v. State of California, *supra*, 2 Cal.3d 223, holding that the requirement of literacy in English could not be applied to citizens who are literate in Spanish.

[26]Gray v. Sanders (1963) 372 U.S. 368, held that Georgia's "county unit system" (somewhat analogous in operation to the federal electoral college) unconstitutionally diluted the weight of some votes on the basis of geographical location. *Gray* stands for the proposition that "once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote . . . ." (372 U.S. at p. 379.)

[27]Wesberry v. Sanders (1963) 376 U.S. 1, extended the rule of population equality to congressional districting. An apportionment of congressional seats which "contracts the value of some votes and expands that of others" is unconstitutional, *Wesberry* held, since "the Federal Constitution intends that when qualified voters elect members of Congress each vote be given as much weight as any other vote . . . ." (376 U.S. at p. 7.)

[28]Reynolds v. Sims (1964) 377 U.S. 533 applied the "one man, one vote" principle of *Gray* to state legislative apportionment. Every qualified resident, *Reynolds* held, has the right to a ballot for the election of state legislators of equal weight to the vote of every other resident and that right is infringed when legislators are elected from districts of substantially unequal population.

be conducted on the basis of substantial population equality among such units. Subsequent cases have insisted upon a rule of absolute equality of population[29] and have extended the principle of "one man, one vote" to various units of local government.[30] The result of these decisions has been to equalize the effectiveness of participation in the political process.[31]

The third category of which we speak is less neatly defined. In a general way, it deals with the extent to which a state, through the political process, may impose on the interests of one group burdens which are significantly more onerous than those it imposes on similar interests of other groups. In two cases decided last term, the high court struck down state and local laws placing unusual obstacles in the path of certain political and racial groups.[32]

In our view, these three groups of decisions fashion the doctrinal structure and delineate the basic principles that must govern our decision in the case at bench. Turning now to the issue before us, we conceive the broad question to be whether California, after having directed that certain matters of local governmental policy be submitted to the

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[29]Kirkpatrick v. Preisler (1969) 394 U.S. 526; Wells v. Rockefeller (1969) 394 U.S. 542.

[30]Avery v. Midland County (1968) 390 U.S. 474; Hadley v. Junior College District (1970) 397 U.S. 50 [25 L. Ed. 2d 45].

[31]California cases implementing the "one man, one vote" mandate include: Silver v. Reagan (1967) 67 Cal.2d 452; Wiltsie v. Board of Supervisors (1966) 65 Cal.2d 314; Miller v. Board of Supervisors (1965) 63 Cal.2d 343 and Silver v. Brown (1965) 63 Cal.2d 270.

[32]See Williams v. Rhodes, *supra*, 393 U.S. 23, holding unconstitutional under the equal protection clause Ohio election laws which imposed requirements to qualify for positions on the ballot giving a decided advantage to the established political parties; Hunter v. Erickson (1969) 393 U.S. 385, invalidating, on equal protection grounds, a city charter provision requiring that fair housing ordinances passed by the city council be submitted to the voters in a city-wide referendum.

people, may require the outcome to be determined by a decisional process other than that of a simple majority vote.[33]

Petitioners contend that it may not. Their position may be fairly summarized as follows: article XI, section 18, classifies voters on the basis of the manner in which they vote and, by requiring a two-thirds majority, patently discriminates against those who vote in favor of bond issue propositions. This dilution of voting power denies such voters equal protection of the laws, absent a showing that the provision is necessary to promote a compelling state interest. While economic conditions in the late Nineteenth Century may have justified such a provision, today it is no longer necessary to impair the right to vote in order to guarantee responsible municipal financial policies.

Respondents' position is more elaborate. First, respondents contend, for various reasons, that the equal protection clause has no application to this case. Second, assuming that the equal protection clause does apply, respondents urge, again for a variety of reasons, that we not adopt the stringent standard of review for which petitioners argue, but instead apply the traditional equal protection test and inquire merely whether the two-thirds vote requirement bears any rational relationship to a valid state purpose which, they

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[33]The question has been decided by the highest court of two states, West Virginia and Idaho. Lance v. Board of Education of County of Roane (W. Va. 1969) 170 S.E.2d 783 held that a 60 percent vote requirement for the issuance of local general obligation bonds contravened the equal protection clause. Bogert v. Kinzer (Idaho 1970) 465 P.2d 639, reached the opposite conclusion and upheld a provision of the state constitution requiring a two-thirds majority for the issuance of general obligation bonds. Neither opinion fully explains its conclusion nor why the United States Supreme Court voting rights and reapportionment cases are or are not apposite. Consequently, neither is of particular assistance to us. The United States Supreme Court on April 6, 1970, granted a writ of certiorari in Lance v. Board of Education of County of Roane, *supra*. (Docket No. 1244, Gordon v. Lance.)

maintain, it does. Finally, assuming that the stricter standard of judicial review is applied, respondents assert that the constitutional provision is necessary to achieve a compelling state interest. We shall take up each contention in turn.

I

Respondents argue that petitioners' reliance on the equal protection clause is misplaced; three reasons are advanced in support of this position.

First, it is contended that since the purpose of the equal protection clause is to regulate the manner in which our laws classify citizens, it can have no application here because article XI, section 18, draws no lines between groups and creates no classifications. We do not agree. It appears obvious to us that section 18 implicitly creates two classes of voters: those who favor a proposed bond issue and those who oppose it. It is not essential that a classification appear in explicit terms on the face of the law. Nor is it necessary that those who are allegedly disadvantaged by the classification either constitute a class which is "objectively identifiable" prior to the election or that they share in common other characteristics, such as race, economic status or residence. It is sufficient that the class emerge from its inchoate state at the time of the election and that it be defined by the act of voting affirmatively on a bond issue proposition. The equal protection clause extends to the shared political interests of groups otherwise random and diverse. (Williams v. Rhodes, *supra*, 393 U.S. 23; see also Carrington v. Rash, *supra*, 380 U.S. 89, 94: " 'Fencing out' from the franchise a sector of the population *because of the way it may vote* is constitutionally impermissible." (Italics added.)[34]

[34] Respondents point out that an individual may vote in favor of some bond propositions and against others at the same election. We fail to see the relevance of this observation; it certainly does not demonstrate that section 18 works no classifications. It should be apparent that the section does not classify on the basis of characteristics which will define a physically cohesive, unchanging group.

Next, we are advised that because section 18 deprives no one of his right to vote on bond propositions and because each vote is "fully counted," there is no discrimination, invidious or otherwise, against which the equal protection clause historically has been directed. It is always easier to assume away a problem than to resolve it. However, we think respondents' suggested assumption distorts reality. It does not require extended discussion to establish that the inevitable result of any extraordinary majority requirement is to give to one group of voters a greater influence on the outcome of an election than to another group of comparable size but opposite conviction. This is the functional equivalent of according to each person in the former group a vote of relatively greater weight precisely because of his position on the issue which is to be decided. In other words, a result identical to that produced by a two-thirds vote requirement could be achieved by requiring only a 50 percent affirmative vote for passage of bond issue propositions but providing that in tabulating the election results each negative vote would be multiplied by two while affirmative votes would be counted at face value. Alternatively, those citizens who opposed a measure could be permitted to vote twice while those who favored it were limited to only one ballot. The biased structure of both of these voting schemes is perhaps more obvious than the discrimination inherent in an extraordinary majority vote requirement. The effect of each, of course, is identical. "If a State in a statewide election weighted the male vote more heavily than the female vote or the white vote more heavily than the Negro vote, none could successfully contend that the discrimination was

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Rather, its lines are drawn on the basis of each person's preference on specific bond propositions in particular elections. Accordingly, the class so defined will vary to some extent from issue to issue, election to the election. The fact remains, however, the each participant in the election must vote "yes" or "no" and section 18 classifies the voter on the basis of that expressed opinion. No more is required for the equal protection clause to apply.

allowable. [Citation.]" (Gray v. Sanders, *supra*, 372 U.S. 368, 379.)[35] Although the question of whether such discrimination is allowable has not been settled by the Fifteenth or the Nineteenth Amendment, we think it equally apparent that when a state weights the negative vote more heavily than the affirmative vote, no one can successfully contend that there is *no* discrimination.

Respondents, however, are unwilling to concede that article XI, section 18 (despite its creation of a classification with adverse consequences for those within it) constitutes governmental action to which the equal protection clause is applicable. They buttress this position primarily by the observation that there is no federal constitutional right in the people of a municipality or other local governmental entity to vote on such a matter as the incurring of bonded indebtedness. We do not understand petitioners to dispute this or to claim an inherent right to vote upon all issues concerning governmental expenditures. We emphatically reject, however, the inference, which respondents seek to draw from this initial premise, that voters have no right to equal protection in bond issue elections. To agree that there is no constitutionally granted right to vote on a particular issue is not to concede that such elections as may be

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[35] As stated by Justice Black, dissenting, in Colegrove v. Green, *supra*, 328 U.S. 549, 569-570: "No one would deny that the equal protection clause would . . . prohibit a law that would expressly give certain citizens a half-vote and others a full vote . . . . [T]he constitutionally guaranteed right to vote and the right to have one's vote counted clearly imply the policy that state election systems, no matter what their form, should be designed to give approximately equal weight to each vote cast." See also the opinion of Justice Douglas, dissenting, in South v. Peters (1950) 339 U.S. 276, 279: "There is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth. The right to vote includes the right to have . . . the vote counted at full value without dilution or discount [citation] . . . . That federally protected right suffers substantial dilution . . . [where a] favored group has full voting strength . . . [and] [t]he groups not in favor have their votes discounted."

held are therefore beyond the restraints of the United States Constitution. We are aware of no principle which required the California Constitution to provide that certain issues of local finance were to be entrusted to the voters. (See In re Pfahler (1906) 150 Cal. 71, 79.) Since it has done so, however, the voting procedures established must comply with equal protection. "[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." (Harper v. Virginia Bd. of Elections, *supra*, 383 U.S. at p. 665.)

Respondents also point out that there is no constitutional right to incur indebtedness. This may be correct; it is also wholly irrelevant since the requirements of due process and equal protection apply to governmental acts regardless of whether or not they affect rights specifically guaranteed by other constitutional provisions. (See, e.g., Griffin v. Illinois (1956) 351 U.S. 12; Weiman v. Updegraff (1952) 344 U.S. 183.)

II

We now turn to consider what should be our standard of review in evaluating the classification created by article XI, section 18.

As this court has previously noted,[36] the United States Supreme Court has tended to employ a two-level test in reviewing legislative classifications under the equal protection clause. In the area of economic regulation, the high court has exercised restraint, investing legislation with a presumption of constitutionality and requiring merely that distinctions drawn by a challenged statute bear some rational relationship to a conceivable legitimate state purpose. (See McDonald v. Board of Election (1969) 394 U.S. 802, 809; McGowan v. Maryland (1961) 366 U.S. 420, 425-426.)

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[36]Purdy & Fitzpatrick v. State of California (1969) 71 A.C. 587, 600.

On the other hand, in cases involving "suspect classifications"[37] or touching on "fundamental interests,"[38] the court has adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny. (See Shapiro v. Thompson, *supra*, 394 U.S. 618, 638; Sherbert v. Verner (1963) 374 U.S. 398, 406; Skinner v. Oklahoma, *supra*, 316 U.S. 535, 541; see also *Developments in the Law - Equal Protection* (1969) 82 Harv. L. Rev. 1064, 1120-1131.) Under the strict standard applied in such cases, the state bears the burden of establishing not only that it has a *compelling* interest which justifies the law but that the distinctions drawn by the law are *necessary* to further its purpose. The dual aspect of this standard is clearly formulated in the opinion of Justice Marshall, dissenting, in Hall v. Beals (1969) 396 U.S. 45, 52: ". . . once a State has determined that a decision is to be made by popular vote, it may exclude persons from the franchise only upon a showing of a compelling interest, and even then only when the exclusion is the least restrictive method of achieving the desired purpose. [Citations.]"

As the above quotation indicates the United States Supreme Court has included voting in the category of rights deemed "fundamental." Accordingly, state laws which permit or require differential treatment of those attempting to exercise this right have been "carefully and meticulously scrutinized" (Reynolds v. Sims, *supra*, 377 U.S. 533, 562) in order to determine whether the burdens imposed are "necessary to promote a compelling state interest." (Kramer v. Union School District, *supra*, 395 U.S. 621, 626-627; see

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[37]Certain classifications, such as those based on race (McLaughlin v. Florida (1964) 379 U.S. 184) or wealth (Douglas v. California (1963) 372 U.S. 353), are "highly suspect" (*McDonald, supra*, at p. 807).

[38]Interests which have been identified as fundamental and therefore deserving of special treatment under the equal protection clause include procreation (Skinner v. Oklahoma (1942) 316 U.S. 535) and interstate travel (Shapiro v. Thompson (1969) 394 U.S. 618).

also Cipriano v. City of Houma, *supra*, 395 U.S. 701; Castro v. State of California, *supra*, 2 Cal.3d 223; Otsuka v. Hite, *supra*, 64 Cal.2d 596, 602.)

Respondents, however, contend that the reapportionment and voting rights cases are not controlling and urge us to apply the more lenient standard, traditionally associated with review of fiscal and economic regulatory measures, in evaluating petitioners' equal protection claims. Two theories are advanced in support of this contention. Neither, we believe, has merit.

First, it is argued that the right to vote (which is termed a "political" right) is not involved in this case, and that the reapportionment and voting rights cases, which did concern this "political" right, are inapposite. We are told that a vote in a bond issue election is merely a "procedural" step in an "administrative" process of authorizing a particular form of indebtedness. This, in turn, is said to be only an "economic" matter. We do not believe it would be either sensible or responsible for our decision to turn on whether bond issue elections are characterized as "political" or "procedural and administrative."

Voting for or against a candidate for public office is obviously not precisely identical to voting for or against a ballot proposition authorizing a local legislative body to incur a specific indebtedness to finance a particular project. But neither is it wholly dissimilar. Respondents have suggested no reasons (other than their conclusionary definitional distinctions) for us to ignore the salient fact that what might be termed an "administrative" decision is made, in a bond election, by a political method closely resembling direct democracy. Nor have any reasons been presented which indicate less need for judicial scrutiny in the context of such elections. Indeed, so far as appears, all that underlies this argument is the inaccurate observation that the Supreme Court has articulated the higher equal protection standard only in cases involving elections for public office. However, as the court itself has indicated, it is the nature of the right

asserted, not the type of election, which is the critical determinant.[39]

In any event, the argument has been foreclosed by Cipriano v. City of Houma, *supra*, 395 U.S. 701. *Cipriano* concerned an election whose purpose was not to select among candidates for a public office, but, as in the case at hand, to determine whether or not a proposed local government bond issue should be approved.[40] The court perceived no distinction between the election in *Cipriano* and that in *Kramer*, which was an election to choose representatives on a policymaking body. Applying the identical standard, the court held that the exclusion of nonproperty owners violated equal protection because it had not been shown necessary to promote a compelling state interest. (395 U.S. at p. 706.)

We find respondents' second argument no more persuasive. Pointing out that, unlike *Harper*, *Kramer*, and *Cipriano*, this case does not involve an absolute denial of the

[39]In *Kramer*, *supra*, the court stated: "Our exacting examination is not necessitated by the subject of the election; rather, it is required because some resident citizens are permitted to participate and some are not." (395 U.S. 621, 629.) And, in Hadley v. Junior College District, *supra*, 397 U.S. 50, 54 [25 L. Ed. 2d 45, 50], it held: "When a court is asked to decide whether a State is required by the Constitution to give each qualified voter the same power in an election open to all, there is no discernible, valid reason why constitutional distinctions should be drawn on the basis of the purpose of the election."

[40]The election in *Cipriano* involved revenue bonds; those at issue here involve general obligation bonds. The parties have correctly ascribed no relevance to this distinction for the purpose of determining the applicable equal protection standard. The United States Supreme Court has just held that there is no significant difference between the two types of municipal security insofar as the constitutionality of excluding voters on property-ownership grounds is concerned. Applying the standards utilized in *Kramer* and *Cipriano*, the high court held that state laws which restrict to property taxpayers the vote in elections to approve proposed general obligation bonds violate the equal protection clause. (Phoenix v. Kolodziejski (1970) ___ U.S. ___; 38 U.S.L. Week 4596.)

franchise, respondents contend that under McDonald v. Board of Elections, *supra*, 394 U.S. 802, the traditional equal protection test should be applied. Respondents' reliance on *McDonald* is misplaced. As the court noted in *Kramer*, the right to vote was not at issue in *McDonald*, which involved merely a "claimed right to an absentee ballot." (395 U.S. at p. 627, fn.6.) We have found no decision of the United States Supreme Court intimating that states may restrict or infringe voting rights, upon a mere showing of some rational relationship to a valid purpose, so long as they stop short of outright denial. To the contrary, the language of the relevant decisions is deliberately broad and encompassing. For example, in *Harper, supra*, the court declared: "We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might *invade* or *restrain* them must be closely scrutinized and carefully confined. [Citations.]" (Italics added.) (383 U.S. at p. 670.) In Williams v. Rhodes, *supra*, 393 U.S. 23, discussing state laws which imposed "burdens" on the right to vote, the court stated: ". . . the decisions of this Court have consistently held that 'only a compelling state interest. . . .'" could justify them. (393 U.S. at p. 31.) In short, state laws denying or diluting the right to vote are tested by the same stern standard. (See *Kramer, supra*, stating this proposition and citing reapportionment and voter qualification cases interchangeably.)

We are, therefore, satisfied that article XI, section 18, of the California Constitution is valid under the equal protection clause of the Fourteenth Amendment if, and only if, it can be shown necessary to promote a compelling state interest.[41]

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[41] Rimarcik v. Johansen (D. Minn. 1970) 310 F.Supp. 61 supports our conclusion. In that case a three-judge federal district court struck down as violative of the equal protection clause a Minnesota statute requiring 55 percent voter approval to adopt or amend city charter provisions governing liquor control laws. While recognizing that the

III

A.

Primarily, respondents justify the two-thirds vote requirement as a protective device necessary to insure "municipal solvency," promote "fiscal responsibility," and forestall "ill-advised and excessive indebtedness."[42] Stripped of rhetoric, their contention is that it is *necessary* to permit a minority to hold veto power over proposed bond issues approved by a majority of the local legislative body and a majority of their fellow citizens in order to prevent such bonded indebtedness from reaching levels that would necessitate either foreclosure or repudiation. Respondents imply that the two-thirds vote requirement is all that stands between the state and either immediate financial catastro-

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reapportionment cases were factually distinguishable, the court thought the principle they vindicated—the right of a citizen to have his vote given equal weight to those of other voters—was applicable. The court applied the standard articulated in *Kramer*, which it considered controlling in all cases of denial or dilution of voting rights, and held the 55 percent vote requirement unconstitutional since it gave to those opposed to change in liquor laws a disproportionate voice in the outcome without a showing that this was necessary to promote a compelling state interest.

[42]There appear to be two causes for the unusual vagueness with which these goals are described. The first is the scarcity of informative documentary evidence as to the intention of those who drafted and adopted the two-thirds requirement. (See pp. 14-15, *ante*.) To the extent this is the cause, the lack of specificity is unavoidable. The second cause appears to be a confusion between the general principle of debt control and the particular technique of an extraordinary majority vote requirement. We emphasize that the propriety of state imposed restrictions on local debt formation is not in issue. What is in issue is the legality of the two-thirds requirement and it is the connection between *this device* and municipal solvency which must be demonstrated.

phe[43] or ultimate collapse of its political subdivisions under crushing burdens of debt foolishly incurred by reckless or malevolent popular majorities. There is no support for respondents' position. On the other hand, we find persuasive petitioners' argument that it is no longer necessary to restrict citizens' voting rights in order to protect society from the financially irresponsible accumulation of bonded indebtness by local governments.

First, critics have characterized the two-thirds requirement as a "crude mechanical response to improvident overextension of public debt in the fiscally unsophisticated period of the latter Nineteenth Century." (See Cal. Const. Revision Com., *supra*, p. 370.) Petitioners point out that virtually every factor which may have been relevant during the chaotic period of its enactment has since been altered dramatically. One of the most significant changes is the "great improvement in the quality and integrity of governmental and financial administration. The existence of more responsible and responsive local legislative bodies, the development of a corps of professional administrators and finance officers, improvements in the management of local affairs, and the development and refinement of standards, procedures and techniques for financial administration—these are all important reasons why today's local governments are not likely to spend themselves into bankruptcy or to refuse to pay their debts." (Marini, Local Bond Elections in California: The Two-Thirds Majority Requirement (Univ. of Cal. Institute of Governmental Studies, 1963) p. 4.)

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[43]To the extent that respondents have specified their fears in this regard, we believe them to be unrealistic. If, as respondents assert, many presently authorized bonds cannot be sold because of the currently high market interest rates, we do not see how an increase in bond issue election successes as a result of a lower vote requirement could have seriously harmful consequences. The only effect would appear to be an increase in the amount of authorized but unsold bonds. In any event, we do not believe that current market conditions can justify the indefinite continuation of a device which so severely impairs the right to vote.

The institutions of the private sector have undergone a similar evolution. The bond market was a shambles when section 18 was written; now its well ordered operations discourage unsound bond offerings. "Numerous modern procedures of fiscal administration have been developed since 1879. A host of auditing and financial accounting requirements have been written into law. [See, e.g., Ed. Code, §§ 17199, 17206.] The bond market itself is subject to safeguards precluding most of the practices that the 1879 constitutional provision was probably intended to correct. For example, greatly improved reporting procedures are now in effect, assuring that full and accurate information on the financial and legal ramifications of individual bond issues is supplied to prospective buyers.[44] Highly qualified bond consulting firms, specialized legal counsel and careful bond issue evaluation by respected national rating agencies, have all built strong public confidence in most local bond offerings. The sense of security appears to be general, and is not limited to states requiring an extraordinary majority vote. This fact, in itself, strongly suggests that the many institutional and procedural improvements outlined here—and not the two-thirds requirement— are responsible for the soundness of modern local capital outlay finance." (Scott and Hamilton, *op. cit. supra*, at p. 2.)[45]

Second, other provisions of article XI, section 18, itself serve to moderate any tendency to incur debt beyond th

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[44]Bonds which might jeopardize a community's financial stability would be unlikely to find a purchaser. Municipal bonds are valued by investors not because of their speculative possibilities but because of their great security and the favorable federal tax treatment accorded them under 26 U.S.C.A. section 103. In addition, bond purchasers are unusually sophisticated; in 1964 over 60 percent of all bondholders were institutional investors such as commercial banks and insurance companies. (Investment Bankers Association of America, Fundamentals of Municipal Bonds (4th ed. 1965) p. 21.)

[45]See also United States Advisory Commission on Intergovernmental Relations, A Commission Report: State Constitutional and Statutory Restrictions on Local Government Debt (1961) at p. 22.

capacity of the issuing entity to service or beyond its capacity to service without curtailing essential governmental functions. Each general obligation bond issue is required to contain a provision "for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due" and also "to constitute a sinking fund for the payment of the principle thereof. . . ." (Cal. Const., art. XI, § 18.)[46] It is this tax, the total amount of the bond issue, and the purpose for which the bonds are issued and on which their proceeds are to be expended, which are submitted to the electorate. The requirement of an election itself may act as a deterrent to unnecessary borrowing, since the effort and expense entailed make it unlikely to be undertaken without serious thought and preparation. More important, the electoral mechanism permits open debate and discussion of the merits of each bond proposal by the residents of the local community. We consider it fanciful to argue, in the absence of any evidence, that a majority of this electorate, better educated and with access to far more sources of information than its counterpart of a century ago,[47] is so incapable of

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[46]In City of Redondo Beach v. Taxpayers, Property Owners, Etc., City of Redondo Beach, *supra*, 54 Cal.2d 126, we indicated that the purpose of requiring contemporaneous authorization of the necessary tax increment was to "safeguard the general funds and property of a municipality from a situation whereby the holders of an issue of bonds could, . . . force an unconsented-to increase in the taxes, or foreclose on the general assets and property of the issuing public corporation to obtain payment . . . ." (54 Cal.2d at p. 131.) It is obvious that a simple majority vote could authorize this tax quite as effectively as a two-thirds majority. Since this is so, the extraordinary majority requirement may not be justified on the ground it protects real property (and its owners) from the risks just described.

[47]Several provisions of our election laws seek to provide an accurate description of bond propositions and to insure that the voter has access to the viewpoints of both proponents and opponents. Thus, an analysis of the proposition made by public counsel (Elec. Code, §3781) and a statement as to its tax cost (Elec. Code, § 5300 et seq.) are mailed to all voters. Opportunity is available for both favoring and opposing views to be included in ballot arguments and distributed to voters without cost. (Ed. Code, § 1460 et seq.; Elec. Code, §§ 3782, 3783, 5010 et seq.)

mature judgment that it will bankrupt itself through indiscriminate borrowing.

Nor is there any evidence that California's two-thirds requirement (which is among the most restrictive in the nation),[48] has produced greater fiscal security than may be achieved with a simple majority vote requirement. Although most states do not require a two-thirds vote, we have been referred to no data indicating more frequent bond defaults, lower credit ratings, or extravagant public projects in those states. As we have previously noted, since 1849 the State of California has been permitted to borrow in excess of its debt limit with the approval of 50 percent of those voting on a particular bond issue. (Cal. Const., art. XVI, § 1.) Yet, State of California general obligation bonds are rated as high-grade bonds by the major investment advisory services. The judgment of the market place does not support respondents' argument.[49] Indeed, the credit rating of a community may well be eventually impaired if, as a result of inability to secure a two-thirds consensus, necessary projects are deferred and the quality of life deteriorates.

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[48]Most states require some form of mandatory referendum as a condition precedent to incurring of local debt (Starner, *op. cit. supra*, p. 7). However, requirements vary, especially with regard to the majority required to approve a bond issue. By far the most common provision is for a simple majority. Only four states (California, Idaho, Kentucky and Missouri) require two-thirds as a general rule. (Cal. Const. Revision Com., *op. cit. supra*, at p. 372. Note, *Judicial Activism and Municipal Bonds* (1970) 56 Va. L. Rev. 295, 331-334.)

[49]A recent handbook published by the Investment Bankers Association of America, Fundamentals of Municipal Bonds (see fn. 44, *ante*) devotes a chapter to analyzing the credit of issuing municipalities. Factors ranging from the community's past attitude toward debt and the character of its officials, to its tax structure and the relationship of its current debt service requirements to its annual revenues are discussed. *No* reference is made in the credit analysis to the factor of whether the bonds were approved by two-thirds or a simple majority of the voters.

Finally, there is impressive evidence that the two-thirds vote requirement has not so much limted total local government indebtedness as it has redirected borrowing into vehicles other than the general obligation bonds of regularly constituted political units. While the economic consequences of these alternate financing devices are substantially similiar to those of voted general obligation bonds, they are not required to receive a two-thirds majority vote and, in some instances, permit long-term borrowing over which the public has no direct control at all.[50]

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[50]Many ingenious organizational and financing arrangements have been devised to avoid the extraordinary majority barrier. For example, it is widely believed that the goal of avoiding the two-thirds vote requirement has stimulated formation of special districts which fall outside the scope of the constitutional provision. This, of course, simply increases the confusion and inefficiency which result from the artificial and complex structure of overlapping governmental units. (See Cal. Const. Revision Com., *supra*, pp. 367-368.) The principal financing devices which have been utilized to, in effect, incur long-term debt without securing a two-thirds vote are revenue bonds, various forms of lease-purchase financing, and joint powers authority bonds.

Revenue bonds are those which are dischargeable solely through revenues generated by the capital improvement system whose construction or enlargement they finance. They are not within the ambit of article XI, section 18 despite the fact that a pledge of the system's total revenues will diminish the financial resources of the entity that are available for general governmental expenditures, by reducing or eliminating operational revenues previously used for such purposes. However, their use is confined to the financing of projects which are income producing.

A second financing pattern which has developed is the lease of an improvement by a governmental entity from a public body that has constructed or purchased it. Initially, these lessor entities were separately managed public retirement systems which financed the improvement with retirement funds on hand. Subsequently, cities and counties wishing to construct nonvoted improvements would enter into leases with nonprofit corporations (which were often organized with the active encouragement of the lessee city or county). Such corporations were able to issue tax-exempt bonds without voter approval and apply the proceeds from the bond sales to the construction of the desired project. The project was then leased to the public entity,

This phenomenon has attracted the widespread, often critical, attention of legal and financial commentators.[51] Their consensus, which we accept, is that the diversion of local borrowing into novel, more costly financing methods which often entirely evade submission to elections, renders any claim that the two-thirds vote requirement insures sound fiscal policy and popular control of long-term borrowing highly dubious at best.[52]

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the nonprofit corporation pledging the lease rentals as security for its bonds.

Joint powers authority financing contemplates the formation of a separate and independent authority by joint action of two preexisting governmental units under the Joint Exercise of Powers Act. (Gov. Code, §6500 et seq.) The authority constructs the desired project with funds derived from the sale of its bonds, which do not need extraordinary majority voter approval. It then leases the improvement to one or more of the public entities which formed it, using the lease rentals to retire the bonds.

[51] Beebe, et al., *Joint Powers Authority Revenue Bonds, supra*, 41 So. Cal. L. Rev. 19, contains an excellent history of state debt control and efforts to circumvent it in California. California Constitution Revision Commission, *supra*, pp. 360-368, provides a thorough compilation of case authority upon which the various financing techniques utilized to avoid the two-thirds requirement have been based. See also Rogers, *Municipal Debt Restrictions and Lease Purchase Financing* (1963) 49 A.B.A.J. 49; United States Advisory Commission on Intergovernmental Relations, *op. cit. supra*, at pp. 34-35; Marini, *op. cit. supra*, at pp. 11-16.

[52] In an address to the Extraordinary Majority Conference held on February 28, 1970, at the School of Law, University of California at Davis, under the joint sponsorship of the law school and the Institute of Governmental Affairs, Alan K. Browne, senior vice president of the Bank of America stated: "This is an era, for better or worse, of creative public finance. Where the need exists, a way will be found to fund it. The question is not whether and in what amount public improvements will be made, but rather how—by voted bonds or jerry-built financing vehicles; and by whom—the states and their localities, or by artificial creatures of public governments in masquerade." The full text of Browne's remarks will be published in the transcribed proceedings of the Conference on the Extraordinary Majority Requirement by the Institute of Governmental Affairs.

We find nothing to support respondents' grim warnings of financial disaster in the absence of a two-thirds vote requirement. We must, therefore, conclude that that provision is not necessary to insure the solvency of our local governments.

B.

A variety of other interests are asserted to be served by the extraordinary majority vote requirement. It is claimed, for example, that the state should be allowed to insist, before permitting its political subdivisions to incur bonded debt, that "a strong popular and informed public sentiment be satisfied as to the priority, the wisdom, the financial ability of the community to absorb the cost, and the public interest [in] and necessity for the creation of indebtedness for the particular improvement." This public sentiment, it is contended, is not expressed in a majority vote; it is expressed in a two-thirds vote. We do not doubt that a two-thirds requirement is well suited to deter the forms of governmental action to which it applies, since it conditions such action on a degree of consensus unusual in our pluralistic society. This, however, merely emphasizes the impact and burden of section 18; it does not justify it.

It is explained that the necessity for this consensus stems from the nature of bonded indebtedness. We are told that long-term borrowing irrevocably commits the future revenues of a community and that such a drastic step should not be undertaken upon the will of a mere majority. However, many decisions of government at all levels are crucial and irreversible, yet this alone has never been thought a sufficient ground upon which to remove them from the democratic process. We are not persuaded that a decision to commit future tax revenues to the financing of projects whose scale and useful life make payment of their costs from current revenues impracticable or inequitable is so unique or so fraught with peril that it warrants this deprivation of voting rights.

We do not think respondents have demonstrated that bond-finance decisions are fundamentally different from many other political decisions made by a majority vote or by representatives elected by a majority vote. Even assuming, however, that respondents had done so we think their argument fails at another level. This justification for the extraordinary majority requirement rests on the premise that a decision to *undertake* a project such as the construction of schools and playgrounds is qualitatively different from a decision *not to* do so. This, in turn, is based on the assumption that spending money is a more serious matter than not spending it and, consequently, must be justified whereas frugality is self-justifying. A predisposition to thrift may serve a man well. It does not, however, justify governmental inertia, especially when government is faced with critical social problems demanding urgent and sometimes costly remedies. There is no presumption in favor of inaction, as the United States Supreme Court observed in Avery v. Midland County, *supra*, 390 U.S. 474, 484: "[W]e might point out that a decision not to exercise a function within [local government's] power—a decision, for example, not to build an airport or a library, or not to participate in the federal food stamp program—is just as much a decision affecting all citizens . . . as an affirmative decision."

In sum, we do not believe that the nature of general obligation bond financing warrants diluting the votes of those who want action, in order to institutionalize a preference for the interests of those who want stasis. (Hunter v. Erickson, *supra*, 393 U.S. 385, 392-393.)[53]

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[53]See also Valtierra et al. v. The Housing Authority of San Jose et al. (N.D. 1970) ___ F. Supp. ___, 38 U.S.L. Week 2528, in which a three-judge federal district court held unconstitutional article XXXIV of the California Constitution. Relying on *Hunter*, the court held that the constitutional provision, which required that low-rent housing projects financed by government be approved by community residents in a mandatory referendum, violated the equal protection clause. On June 8, 1970, the United States Supreme Court noted probable jurisdiction. (38 U.S.L. Week 3485.) (Docket No. 1557, James v. Valtierra.)

Nor do we believe that the two-thirds requirement may be justified as a method of protecting real property owners from additional taxes necessary to service the higher level of bonded indebtedness which it is reasonable to assume would result were bonds to be issuable upon simple majority approval. We express no opinion as to whether or in what circumstances the state may structure its election laws to accommodate the financial interests of property owners. Assuming, arguendo, this to be a legitimate state interest, we do not believe that under contemporary conditions it is so compelling as to justify depriving petitioners of their right to a fully effective vote.

The argument that a two-thirds requirement is necessary to protect property owners rests on the following assumptions: (1) That the relationship between the level of bonded debt and the property tax rate is constantly proportional; (2) that bonded debt is voted by an electorate which, by and large, does not pay property taxes and is thus undeterred by the prospect of their increase; and (3) that maintenance of low property tax rate levels will invariably be in the best short and long-term interest of property owners. While possibly accurate in the 1870's, none of these assumptions has been shown to be valid today.

First, the close link between general obligation indebtedness and property taxes, characteristic of the Nineteenth and early Twentieth Century, no longer exists.[54] Not only has the percentage of municipal revenues generated by the

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[54]Marini, *op. cit. supra*, at p. 6. Thus, while bonded indebtedness of all California cities has risen from $790,725,000 in 1954-1955 to $1,994,781,860 in 1966-1967 (California Controller, Annual Report of Financial Transactions Concerning California Cities (1966-1967) p. XI), the average city property tax rate has remained stable, increasing only from $1.83 (per $100 assessed valuation) in 1957-1958 to $1.84 (per $100 assessed valuation) in 1966-1967. (*Id.* at p. III.) Respondents are officials of a combined city and county whose consolidated tax rate is, of course, higher. (See fn. 2, *ante*.)

property tax declined sharply,[55] but in practice, many general obligation bonds have been redeemed through revenues derived from sources, such as excise taxes and enterprise activities, other than the property tax.[56]

Second, the information available to us does not warrant a characterization of property owners as a beleaguered minority which would be forced to shoulder the total cost of bond-financed projects. There are indications that a substantial majority of the registered voters in California own their own homes.[57] In addition, it is important to recognize that those who do not own real property nevertheless pay property taxes indirectly. Rental payments of lessees of taxable real property are to a material extent a function of the property tax.[58] Those few who neither own nor rent taxable property must still purchase goods and services from commercial enterprises that do and which, to some extent at least, incorporate that tax in the prices charged consumers.[59]

Thus, the factual predicates of respondents' contention do not exist. The probability of a property-owning minority being subjected to confiscatory taxation by the unbridled appetities of the property less masses is no more than

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[55]In 1912 the property tax accounted for 82 percent of the revenue of California cities; in 1960 it accounted for only 40 percent (Marini, *op. cit. supra*, at pp. 5-6.) In 1966-1967 this had declined further to only 34 percent (California Controller, *op. cit. supra*, at p. VII).

[56]California Controller, *op. cit. supra*, at p. XI.

[57]Marini, *op. cit. supra*, at p. 6, fn. 4.

[58]*Id.*, at pp. 6-7; Scott and Hamilton, *op. cit. supra*, at p. 3.

[59]In addition, these citizens directly pay a variety of local excise taxes which are available for commitment to debt service. (Cal. Const. Revision Com., *op. cit. supra*, at p. 375.) Of course, all citizens, whether or not they own property, share a subjective interest in and are affected by the developmental policies of their community and the projects for which bond financing is sought.

"theoretically imaginable."[60] (Mine Workers v. Illinois Bar Assn. (1967) 389 U.S. 217, 224.) No such remote dangers can justify the "immediate and crippling impact" (Williams v. Rhodes, *supra*, 393 U.S. 23, 33) on the rights of all citizens (property owners or not) who favor certain proposed governmental action, to receive equal protection of the law.

Finally, respondents advance the argument that the compulsory referendum of section 18 stimulates development of a more enlightened citizenry and provides local residents with direct control over their government. This may well be true. It is, however, a purpose equally well served by a referendum whose outcome is determined by simple majority will. There is no causal relationship (much less a necessary one) between the benefits of "participatory democracy" and extraordinary majority vote requirements.

We conclude, therefore, that the two-thirds vote requirement is not necessary to the attainment of any compelling state interest.

IV

We are unimpressed with respondents' remaining justifications proffered for the extraordinary majority requirement. Initially we find no significance in the fact that the two-thirds requirement of article XI, section 18, may be eliminated or modified by a simple majority of the voters in the state through a constitutional amendment. (See Cal. Const., art. IV, § 22; Cal. Const., art. XVIII, § 1.) Our conclusion in this regard is squarely required by Lucas v. Colorado

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[60]It is by no means obvious that a two-thirds vote requirement would be constitutionally permissible even were this a more realistic possibility. Underlying respondents' argument is a normative assumption that, for each individual, the benefits derived from governmental action should correspond to the burdens imposed by the taxing system; i.e., that those who use public facilities should pay for them. This assumption has never been though to describe our actual tax structure which is based, instead, on an "ability to pay" theory.

Gen. Assembly (1964) 377 U.S. 713. The high court there held that the existence of a political remedy such as the initiative or referendum, while possibly justifying a court's decision to tamporarily defer action, is of no constitutional significance. "Courts sit to adjudicate controversies involving alleged denials of constitutional rights . . . [I]ndividual constitutional rights cannot be deprived, or denied judicial effectuation, because of the existence of a nonjudicial remedy through which relief . . . which the individual voters seek, might be achieved." (377 U.S. 713, 736.)[61]

Nor is our conclusion altered by the fact that a proposed constitutional amendment to article XI, section 18 (Proposition 4), designed to reduce the required voter majority to 60 percent for school and library bond issues submitted to the voters at statewide primary or general elections, was defeated in November 1966. At the outset, we must observe that the proposed amendment might well have failed to command the support of many voters who opposed the two-thirds requirement yet found certain elements of Proposition 4 unacceptable.[62] Thus, respondents' suggestion that the people of California have made a definite choice between two sharply contrasting alternatives and have indicated that they prefer, as a general rule, a minority veto

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[61]In addition, the fact that a majority of the voters of the State of California may have a practicably available political remedy does not mean that petitioners or the voters of San Francisco (who represent only a small minority of the voters in the state) have one.

[62]The text of Proposition 4 as well as the arguments for and against the measure are reprinted in Beebe, *op. cit. supra*, at pp. 29-30, fn. 38. It is apparent from an examination of these materials that voters who would have supported a total elimination of extraordinary majority requirements for bond elections may have considered Proposition 4 a piecemeal, halfway reform measure and withheld their support on that ground. Other may have opposed the amendment because they could see no reason for singling out library bonds for preferential treatment. Still others may have felt that the consequences of the amendment's limitation of a reduced voter requirement to issues submitted at statewide elections would be undesirable.

power over local general obligation bond issue propositions is not factually supportable.

More fundamentally, popular approval of electoral systems which infringe an individual's constitutionally protected right to cast an equally weighted vote is irrelevant. "A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be. [Fn. omitted.]" (Lucas v. Colorado Gen. Assembly, *supra*, 377 U.S. 713, 736-737; Jordan v. Silver (1965) 381 U.S. 415 (concurring opinion).)[63]

We find no merit in the theoretical argument that there has been no violation of the equal protection clause because the elections here in issue represent an exercise of the legislative power retained by the people rather than of that delegated to the state Legislature. To describe in conceptual terms the origin of the power exercised at bond elections

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[63] "'The protection of constitutional rights is not to be approached either pragmatically or expediently, and though the fact of enactment of a constitutional provision by heavy vote of the electorate produces pause and generates restraint we can not, true to our oath, uphold such legislation in the face of palpable infringement of rights. Thus, state racial legislation would unquestionably enjoy overwhelming electorate approval in certain of our states, yet no one would argue that this factor could compensate for manifest inequality. It is too clear for argument that constitutional law is not a matter of majority vote. Indeed, the entire philosophy of the Fourteenth Amendment teaches that it is personal rights which are to be protected against the will of the majority. The rights which are here asserted are the rights of the individual plaintiffs to have their votes counted equally with those of other voters . . . . [T]o say that a majority of the voters today indicate a desire to be governed by a minority, is to avoid the issue which this court is asked to resolve. It is no answer to say that the approval of the polling place necessarily evidences a rational plan. The plaintiffs have a right to expect that the cause will be determined in relation to the standards of equal protection. Utilization of other or different standards denies them full measure of justice.'" (Lisco v. Love (1963) 219 F. Supp. 922, 944 (dissenting opinion); quoted in Lucas v. Colorado Gen. Assumbly, *supra*, 377 U.S. 713, 737, fn. 30.)

does not answer the question before us, which is to determine the restraints imposed on that power by the equal protection clause. The United States Supreme Court, however, has conclusively answered this argument: "[I]nsisting that a State may distribute legislative power as it desires and that the people may retain for themselves the power over certain subjects may generally be true, but these principles furnish no justification for a legislative structure which otherwise would violate the Fourteenth Amendment." (Hunter v. Erickson, *supra*, 393 U.S. 385, 392.)

Respondents press a final argument upon us. They point out that the extraordinary majority requirement of article XI, section 18, is not unique and that there are many contexts in which governmental action is conditioned upon the ability of its proponents to secure the support of more than a bare majority. They observe that unqualified majoritarianism has not been the model for many of our institutions and that we have often afforded minorities power to preserve the status quo. They confront us with provisions of our federal and state constitutions which sanction deviations from simple majority rule.[64] They then admonish us that,

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[64]Respondents include in their compilation the following extraordinary majority provisions:

A) United States Constitution: article 1, section 3 (conviction in an impeachment proceeding); article 1, section 5 (expulsion from Congress); article 1, section 7 (overriding of an executive veto); article II, section 2 (ratification of treaties); and article V (constitutional amendment process).

B) California Constitution: article IV, section 8(a) (elimination of thirty-day waiting period before consideration of bill); article IV, section 8(d) (passage of emergency legislation); article IV, section 10(a) (override of executive veto of general bills); article IV, section 10(b) (override of executive reduction of appropriations bill); article IV, section 12(d) (appropriations from the general fund); article XI, section 7½ (surrender and annulment of county charter); article XI, section 2 (removal of county seat); article XII, section 22 (removal from office of Public Utilities Commission member); article XIII, section 14-4/5(i) (change in rate of taxation on insurance companies); article XIII, section 16.3 (imposition of tax on banks); article XIII, section 14 (classi-

since the two-thirds requirement cannot be distinguished from any of these provisions, a decision invalidating it will inevitably undermine the constitutionality of all. We cannot agree.

First, there is no merit to the attempt to analogize section 18 to institutional arrangements of varied historical origin and specialized function, such as the electoral college, the allocation of two senate seats to each state regardless of population, or the unanimous jury verdict required for a criminal conviction. Efforts to justify state-imposed inequalities in voting power through reliance on analogies to other distinct institutions have met with no success in the United States Supreme Court. For example, in Gray v. Sanders, *supra*, 372 U.S. 368, 378, the court declared: "We think the analogies to the electoral college, to districting and redistricting, and to other phases of the problems of representation in state or federal legislatures or conventions are inapposite. The inclusion of the electoral college in the Constitution, as the result of specific historic concerns, validated the collegiate principle despite its inherent numerical inequality, but implied nothing about the use of an analogous system by a State . . . ." (Fns. omitted.) In Reynolds v. Sims, *supra*, 377 U.S. 533, 573, the court observed that: "Attempted reliance on the federal analogy appears often to be little more than an after-the-fact rationalization offered in defense of maladjusted state apportionment arrangements." Our reaction to analogies to, for example, the treaty ratification procedure in the United States Senate is not dissimilar.

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fication of personal property for taxation and assessment purposes); article XVI, section 1 (submission of state bond issue to voters); article XVIII, section 1 (submission of proposed constitutional amendment to voters).

An indication of the varied contexts in which extraordinary majority vote requirements are found is contained in Comment, *Extraordinary Majority Voting Requirements* (1969) 58 Geo. L.J. 411, 412-413, fns. 10-15.

Second, many of the extraordinary majority provisions to which we are referred are readily distinguishable in that, since they apply solely to the internal procedures of legislative bodies, they involve no dilution of the individual exercise of the franchise which is in issue here. Some, such as the two-thirds required for conviction of impeachment (U.S. Const., art. I, § 3) or expulsion from Congress (U.S. Const., art. I, § 5) are designed to avoid precipitate action in areas of particular importance or sensitivity. Others, such as the two-thirds required to override a presidential (U.S. Const., art. I, § 7) or gubernatorial (Cal. Const., art. IV, § 10(a)) veto or the two-thirds required to ratify a treaty (U.S. Const., art. II, § 2) represent those basic allocations of power between branches of government which are at the heart of that great system of "checks and balances" established by the founding fathers. In neither case is there any infringement of the individual citizen's right to vote such as that effected by section 18.

Finally, those extraordinary majority vote requirements which do apply outside the legislative process are by no means uniformly invalidated by our decision today. We emphasize that while it has not been demonstrated that a two-thirds vote requirement for approval of local general obligation bonds is necessary to promote a compelling state interest, similar provisions in other contexts may meet this standard. For example, it is common to insist upon a broad consensus before altering basic political documents. (See, e.g., U.S. Const., art. V.) Documents such as constitutions exist partly to provide continuity and stability to the affairs of state. This is a goal of fundamental importance and one which can be achieved only by protecting such charters from the will of temporary majorities. We see no *a priori* reason to assume that other extraordinary majority provisions cannot be shown to be necessary to attain "compelling" ends. Each must be judged on its particular facts. Those which serve no such end will fall, but our decision today commits us to no wholesale elimination of such laws. We, of course, express no opinion as to the validity of any of the foregoing provisions.

For the reasons already set forth, we hold that insofar as article XI, section 18, of the California Constitution requires the assent of more than a simple majority to authorize the incurring of certain indebtedness by local governmental entities it violates the equal protection clause of the Fourteenth Amendment to the United States Constitution.[65] Since the requirement of a two-thirds vote is entirely distinct and severable from the other provisions of the section, section 18 remains, in all other respects, valid and operative.

We turn now to the issue of affirmative relief. Although employing somewhat different language, petitioners in both S.F. 22706 and S.F. 22707 seek substantially the same relief. Both pray for a peremptory writ of mandate directed to respondents and commanding, generally, that Propositions "A" and "B" be certified as having been duly approved by the voters of San Francisco and that all the usual ministerial steps be taken in order to prepare the bonds for sale.

Respondents, in their return to the alternative writ, contend that, even assuming the two-thirds requirement of section 18 to be unconstitutional, the relief which petitioners request is improper. Respondents assert that, because of the procedures actually followed by the City and County of San Francisco, they have no present duties of a ministerial nature to perform in connection with either bond proposition which have not already been performed.

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[65]Our decision herein extends, of course, to all statutory provisions which implement the constitutional directive. We thus declare unconstitutional those portions of Government Code section 43614 and Education Code section 21754 which incorporate the two-thirds vote requirement in their direction of procedural steps to be followed in the issuance of, respectively, municipal and school district bonds. On the other hand, we need not deal directly with the relevant sections of the Charter of the City and County of San Francisco, since they will automatically correspond to the effect of our decision on article XI, section 18.

We need not decide this question since we have determined that our decision today regarding the constitutionality of article XI, section 18 shall have prospective effect only and that accordingly no peremptory writs should issue.

It is now beyond dispute that the United States Constitution permits state appellate courts to restrict the application of a newly announced rule of law to future cases. (England v. Medical Examiners (1964) 375 U.S. 411, 422; Gt. Northern Ry. v. Sunburst Co. (1932) 287 U.S. 358, 364-366. See also the historical discussion in Linkletter v. Walker (1965) 381 U.S. 618, 622-629.) "State courts have generally found state constitutions equally permissive and have frequently stated that the decision whether to apply an overruling decision retroactively or prospectively only turns on considerations of fairness and public policy. [Citations.]" (Forster Shipbldg. Co. v. County of L.A. (1960) 54 Cal. 2d 450, 459.) This is the rule we have adopted in California (Connor v. Great Western Sav. & Loan Assn. (1968) 69 Cal. 2d 850, 868; County of Los Angeles v. Faus (1957) 48 Cal. 2d 672, 681) even though we have recognized that the purely prospective operation of a decision "temporarily preserves and applies a mistaken interpretation of the [state] Constitution. [Citation.]" (Forster Shipbldg. Co. v. County of L.A., *supra,* 54 Cal. 2d at p. 459.)

In recent years a substantial number of general obligation bond propositions have won the approval of a majority but less than two-thirds of the voters. (Scott and Hamilton, *op. cit. supra,* at pp. 3-5; Cal. Teachers' Assn., Research Bull. No. 228 (Oct. 1968), Results of Tax and Bond Elections in California School Districts 1967-1968, pp. 13-25; Cal. Teachers' Assn., Research Bull. No. 235 (Sept. 1969), Results of Tax and Bond Elections in California School Districts 1968-1969, pp. 17-32.) These bonds share the precise status of those for which Propositions "A" and "B" sought voter authorization. Thus, to declare that the bonds before us were authorized by the voters and to order that

they be prepared for sale would logically commit us to the validation of hundreds of millions of dollars in bonded indebtedness voted upon at now-forgotten elections. Such a course might well impose severe and unforeseen hardships upon many Californians who, quite reasonably, have made significant personal, financial, and civic decisions in reliance upon the apparently settled declaration of election results. Additionally, since times and priorities change, were these same bond propositions resubmitted to the voters today, many might fail to secure even a majority vote. In such circumstances, we consider it fairer and wiser that only prospective effect be given to our decision and that its rule be applied only to elections held after the date upon which this decision becomes final in this court.

This course will settle immediately the status of bond propositions on a uniform, statewide basis. It will permit local governments to propose to the electorate new bond issues, drawn to meet present community needs and to conform to present economic conditions. It will also allow voters to conduct campaigns and cast their ballots on bond propositions with full understanding, in advance, of the rules by which the outcome of the elections will be determined.

The force of these and similar considerations of public policy have impressed other courts. Thus, we find ample authority for our refusal to disturb the results of an election conducted under ground rules later held invalid (Allen v. State Board of Elections (1969) 393 U.S. 544, 571-572; Rimarcik v. Johansen, *supra*, 310 F.Supp. 61, 71; Jennes v. Little (N.D. Georgia 1969) 306 F.Supp. 925, 929; appeal dismissed 397 U.S. 94) and for our decision to limit the retroactive effect of judicial intervention in the bond election process. (Cipriano v. City of Houma, *supra*, 395 U.S. 701, 706; see also Douglass v. County of Pike (1879), 101 U.S. 677, 687; Gelpcke v. City of Dubuque (1863) 68 U.S. 175, 206.)

In each of the proceedings before us (S.F. 22706 and S.F. 22707), the alternative writ of mandate is discharged and the petition for a peremptory writ is denied.

SULLIVAN, J.

WE CONCUR:

WRIGHT, C.J.
McCOMB, J.
TOBRINER, J.
SCHAUER, J.*

*Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

CONCURRING AND DISSENTING OPINION BY MOSK, J. TO OPINION BY SULLIVAN, J.

I concur in the court's conclusion that the two-thirds requirement for passage of bond issues is invalid, but I dissent from the majority's refusal to apply its decision to the litigants before the court.

The majority tell the parties who initiated these proceedings, who used their talents and resources to seek and obtain a hearing in this court, and who invoked the constitutional principles upon which we here rely, that they are undeniably right, their concept of the law is totally vindicated—but they lose, their petition for a peremptory writ denied. This is indeed a Pyrrhic victory, or as John Dryden wrote in the 17th century: "Even victor are by victories undone."

Few problems in both the criminal and civil fields have been fraught with more uncertainty than determination of the precise date on which newly discovered constitutional precepts become applicable. Justice Harlan referred to "the doctrinal confusion that has characterized our efforts" in this arena and the "many incompatible rules and inconsistent principles." (Desist v. United States (1969) 394 U.S. 244, 258 (dissenting opinion).) Legal scholars have been as hopelessly at odds over theories of retroactivity versus prospectivity. (See, e.g., Schaefer (1967) 42 N.Y.U.L. Rev. 631, as contrasted with Haddad (1969) 60 J. Crim. L. 417.)

The federal rule was originally settled, the Supreme Court adhering to the command of article III of the Constitution that it decide only existing controversies. "I know of no authority in this court to say," wrote Justice Holmes with typical grandeur, that decisions "shall make law only for the future." (Kuhn v. Fairmont Coal Co. (1910) 215 U.S. 349, 372 (dissenting opinion).) Two decades later in Great Northern Ry. v. Sunburst Oil & Refining Co. (1932) 287 U.S. 358, the legitimacy of the technique of prospective overruling was firmly established.

However, *Sunburst* made it clear that "A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law nonetheless for intermediate transactions . . . whenever injustice or hardship will thereby be averted." (*Id.* at p. 364.)

Thus three alternatives are available to a state court which has fashioned a new rule. It may apply the rule: (1) to acts occurring subsequent to the announcement only; (2) to acts occurring subsequent to the announcement and also to the present litigants; or (3) to acts occurring subsequent to the announcement, to the present litigants, and also to acts which occurred prior to the announcement. (Note (1962) 71 Yale L.J. 909, 933.) In the instant case the majority choose the first alternative. I prefer the second.

Only the most amorphous guidelines are available to determine which of the alternatives is appropriate in an individual case. Justice Cardozo referred to "considerations of convenience, of utility, and of the deepest sentiments of justice." (Cardozo, The Nature of the Judicial Process (1921) 146-149.) Justice Traynor spoke of "considerations of fairness and public policy." (Forster Shipbldg. Co. v. County of L.A. (1960) 54 Cal.2d 450, 459.) A federal court indicated "that retroactivity should be determined from the circumstances of the particular case, having in mind the purpose which the new rule of law seeks to accomplish and the practical weighing of the comparative benefits and evils of retroactivity." (Hanover Shoe Inc. v. United Shoe Machinery Corp. (3d Cir. 1967) 377 F.2d 776, 789.)

I am unimpressed by the "weighing of comparative benefits and evils," or the reasons–indeed, there is a paucity of reasons–given by the majority for denying to petitioners the fruits of their victory. The majority speak of bonds "voted upon at now-forgotten elections" (ditto, p. 62). In addition to being a gratuitous reflection upon the delays of

the judicial process—not markedly prolonged in this instance[1] —the simple fact is that these specific bond elections are not now-forgotten. They have been kept very much alive in current memory by this well-publicized litigation; both proponents and opponents at the election are eagerly awaiting the results of this lawsuit, and have undoubtedly made appropriate plans for the eventuality of a determination pro or con their position.

To invoke a prospective-only technique results in an arbitrariness toward individual litigants that is uncharacteristic of a court of justice. As Justice Harlan wrote in his dissent in *Desist*, it is a "truism that it is the task of this court, like that of any other, to do justice to each litigant on the merits of his own case."

The United States Supreme Court in Stovall v. Denno (1967) 388 U.S. 293, 301, suggested that someone, i.e., the litigants before the court, must be given the benefit of decisions which create new rights. The high court held: "We recognize that Wade and Gilbert are, therefore, the only victims of pretrial confrontations in the absence of their counsel to have the benefit of the rules established in their cases. That they must be given that benefit is, however, an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum. Sound policies of decision-making, rooted in the command of Article III of the Constitution that we resolve issues solely in concrete cases or controversies, and in the possible effect upon the incentive of counsel to advance contentions requiring a change in the law, militate against denying Wade and Gilbert the benefit of today's decisions. Inequity arguably results from according the benefit of a new rule to the parties in the case in which it is announced but not to other litigants similarly situated in the trial or appellate process who have raised the same issue. But we regard the fact

that the parties involved are chance beneficiaries as an insignificant cost for adherence to sound principles of decision-making." (Fns. omitted.)

Other authorities have advanced the theory that prospective overruling destroys incentive for appeal, and if it becomes a frequent policy, it will tend to deter counsel from presenting "issues involving renovation of unsound or outmoded legal doctrines." (Mishkin, Foreword, *The Supreme Court 1964 Term,* 79 Harv. L. Rev. 56, 61.)

A number of state courts have adopted substantial changes in the law and applied the new doctrine to the case at hand while otherwise giving it only prospective application. (See, e.g., Balts v. Balts (Minn. 1966) 142 N.W.2d 66, 75.) California adopted this procedure when it eliminated governmental immunity (Muskopf v. Corning Hospital Dist. (1961) 55 Cal.2d 211) and again when it imposed liability upon institutions financing tract developments. (Connor v. Great Western Sav. & Loan Assn. (1968) 69 Cal.2d 850.)

In short, the majority subvert an otherwise irrefutable opinion by denying equable application of its benefits. The aggrieved parties who knocked on our door are turned away with advice but without assistance. This, I believe, cannot be rationalized. One can only hope the petitioners find some solace in their service pro bono publico.

I would issue the peremptory writ.

Mr. Justice Peters has authorized me to say that he, too, would issue the writ.

MOSK, J.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 96

A.T. GORDON, et al.,

Petitioners

v.

GRANVILLE LANCE, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, *AMICI CURIAE*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 96

A.T. GORDON, et al.,

Petitioners

v.

GRANVILLE LANCE, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, *AMICI CURIAE*

INTEREST OF *AMICI**

The American Civil Liberties Union is a non-partisan nation-wide organization dedicated solely to the defense of those constitutional liberties safeguarded by the Bill of Rights. The American Civil Liberties Union of Northern

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*Letters of consent from counsel for petitioners and respondents to the filing of this brief have been filed with the Clerk of the Court.

California is affiliated with the American Civil Liberties Union and was actively involved in *Westbrook v. Mihaly*, 87 Cal. Rptr. 839 (1970); *pet. for cert. filed* 39 U.S.L.W. 3096 (9/15/70) a recent decision of the California Supreme Court on issues identical to the ones herein.

In its fifty year history, the American Civil Liberties Union has fought to secure to all citizens and groups the full measure of participation in our political process. We have done so in the belief that political rights are a fountainhead from which the protection and preservation of other cherished liberties will flow. Toward this end, we have engaged in litigation challenging efforts to deny or dilute the political voice of individuals or groups and have participated in such important cases before this Court as *Reynolds v. Sims*, 377 U.S. 533 (1964) and *Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969).

We believe that the instant case raises issues as important as any voting case this Court has decided. It involves a disarmingly simple and direct method of diluting the political power of a majority of the community. For the reasons set forth herein, *amici* submit that the decisions of this Court provide ample doctrinal authority for holding that extraordinary majority requirements in elections such as these deny the majority the equal protection of the law.

STATEMENT OF THE CASE

This case involves provisions of the West Virginia Constitution, Article X, Sections 1 and 8, and Statutes, Sections 13-1-4 and 13-1-14, which provide that, in elections held by political subdivisions of the state to decide whether to incur bond indebtedness or to levy additional taxes, such proposals shall not pass unless they receive the affirmative votes of sixty percent of the votes cast in the election. These provisions were held in violation of the United States Constitution by the highest court in West Virginia. *Lance v. Board of Education of the County of Roane*, 170 S.E. 2d 783 (1969).

In April 1968 the Roane County Board of Education, at a special election, submitted to the voters of the county the question of issuing $1.8 million worth of bonds "for the purpose of alleviating the overcrowded condition of school classrooms and facilities, removing fire hazards, providing for more adequate and more modern vocational and educational facilities, and for the purpose of meeting the needs of disadvantaged children." *Lance v. Board of Education of the County of Roane, supra* at 785. At the same special election, voters were asked to vote on the laying of additional tax levies to support current expenditures and capital improvements. Of the total votes cast, 51.55 percent favored the bond issue and 51.51 per cent favored the tax levy. Because of the sixty-percent requirement, the measures were considered defeated. The respondents herein, voters who had cast their ballots in the affirmative, demanded that the Board of Education authorize the bonds and additional taxes. The Board refused and suit was filed.

In their complaint the respondents alleged that the Roane County schools had been basically unimproved since 1946 and fell far below the state average classroom size and facilities. They further alleged that six previous similar proposals had been "defeated," although each received majorities of affirmative votes, ranging from 51.51 percent to 55.84 percent. The lower court disagreed with the plaintiffs' contention that the sixty-percent requirement denied them equal protection of the laws, but the Supreme Court of Appeals reversed, holding the constitutional and statutory arrangements in violation of the Fourteenth Amendment.

SUMMARY OF ARGUMENT

Requiring some form of mandatory referendum as a condition precedent to incurring local debt or raising local tax rates has long been a feature of American municipal history. Although requirements as to the required majority vary, the most common provision is for a simple majority. See *West-*

brook v. Mihaly, supra at 857, n. 48, *citing Note, Judicial Activism and Municipal Bonds,* 56 Va. L. Rev. 295, 331-34 (1970); *but see, Comment, Extraordinary Majority Voting Requirements,* 58 Geo. L.J. 411, 412 (1969). Demanding more than a simple majority can, as it has here, frustrate the will of the majority of the community in seeking public improvements. If the imposition of an extraordinary majority requirement were merely unsound public policy, it would not be for this Court to condemn such devices. But such arrangements directly and unambiguously dilute the vote of all those who favor a given proposal and in so doing they violate the constitutional command of equal protection of the law.

There are two related, though distinct, doctrinal frameworks in which the issues in this case can be analyzed. First, there are the numerous decisions of this Court which have invalidated arrangements or classifications that directly or indirectly denied or diluted the vote of certain citizens. In the denial cases, particularly the more recent decisions, *e.g., Cipriano v. City of Houma,* 395 U.S. 701 (1969); *Kramer v. Union Free School District No. 15, supra,* this Court has developed and applied its "compelling state interest" doctrine to invalidate the provisions there involved. In the dilution cases, the Court has spelled out its historic one man-one vote doctrine, *e.g., Reynolds v. Sims,* 377 U.S. 533. Both the denial and the dilution cases are informed by the generic notion that each citizen is presumptively entitled to an equal voice in the political process which can be infringed only upon the showing of a compelling, overriding state interest. See *Kramer v. Union Free School District No. 15, supra.* This equal voice principle provides a firm doctrinal basis for invalidating the extraordinary majority requirements here which classify voters into two categories, dilute the voting power of affirmative votes and, conversely, augment the vote of those who cast a negative ballot. This analysis was utilized by the California Supreme Court in *Westbrook v. Mihaly, supra,* to strike a state constitutional provision basically like the one at issue

here. The opinion is thorough and compelling, and *amici* commend its persuasive reasoning to this Court.

Amici will also develop a second, somewhat alternative theory to sustain the judgment below. The method by which the classification of voters into two groups denies equal protection of the law is as straight-forward as many of the devices previously condemned by this Court under the more usual analysis suggested above. But the central notion of the Equal Protection Clause is vulnerable to new or non-traditional methods of attack, deriving either from modern inventions or, as in this case, from the history of a less egalitarian age. This Court has indicated, in *Hunter v. Erickson*, 393 U.S. 385 (1969), the direction that judicial enforcement of equal protection will take to resist these novel methods of discrimination. Our second thesis, derived from *Hunter*, is that a state violates the Equal Protection Clause whenever it isolates the lawmaking interests of disfavored groups and establishes special obstacles to the realization of those interests, obstacles which are significantly more onerous than those faced by other groups. We submit that the sixty percent vote requirement imposes such a special burden and that it therefore runs afoul of the Fourteenth Amendment.

ARGUMENT

I. EQUAL PROTECTION AND VOTING - FROM DENIAL TO DILUTION.

Most of this Court's jurisprudence in the area of voting rights has been developed in cases scrutinizing state schemes which denied the franchise outright to certain citizens or groups. Such a judicial response is not surprising, for the right to vote, since it opens the door to the political process, has been the focus of much discrimination. Certain groups or classes were so historically the victims of that discrimination, such as blacks and women, that separate constitutional protection of their franchise was established (in

the Fifteenth and Nineteenth Amendments). Yet even in the controversies concerning the franchise of such historically mistreated groups the Equal Protection Clause has loomed large and it is quite clear from our present perspective that much of what was guaranteed under those later Amendments could have been, and frequently was, accomplished under the Equal Protection Clause alone.

Thus, for example, the right of blacks to vote in party primaries is firmly established as a part of the guarantee of the Fifteenth Amendment. *Terry v. Adams,* 345 U.S. 461 (1953); *Smith v. Allwright,* 321 U.S. 649 (1944). But the same right is also a part of the Equal Protection Clause. *Nixon v. Condon,* 286 U.S. 73 (1932). (opinion by Cardozo, J.)

And while the right of blacks not to be disenfranchised by racial gerrymandering is easily found in the Fifteenth Amendment, *Gomillion v. Lightfoot,* 364 U.S. 339 (1960), the same result was independently available under the Equal Protection Clause—as pointed out by Mr. Justice Whittaker, concurring in *Gomillion.* In fact, the theory that the Equal Protection Clause prevents a registrar of voters from refusing to register blacks because of their race was accepted as early as 1927 by Mr. Justice Holmes, writing for a unanimous Court in *Nixon v. Herndon,* 273 U.S. 536 (1927).

These cases are the core of the constitutional guarantee of the voting rights of traditionally disfavored groups. They all are, or could have been, equal protection cases. They are straightforward answers to the most obvious types of discrimination.

But just as there are many motives for discriminating at the polls beyond the fear or mistrust based on race or sex or religion, there are many disfavored groups, many neither historically disfavored nor permanently fixed, but carved out to suit some discriminatory goal. For these, too, the Equal Protection Clause has provided shelter. An obvious example is *Harper v. Virginia State Board of Education,* 383 U.S. 663 (1966), in which the Court struck down Virginia's poll tax as a violation of Equal Protection since it discrimi-

nated against the poor. This class is not one tied to race, sex, or religion, and the historical mistrusts they evoke. Its members are mobile; its boundaries are vague; it is a group that one may enter, or leave. The concept of Equal Protection was flexible enough to protect it.

Carrington v. Rash, 380 U.S. 89 (1965), illustrates the same flexibility. There the Court invalidated a Texas constitutional prohibition of voting by servicemen who entered Texas while in service, even though they might be bona fide residents. Here the protected group was even more temporary than the "poor," and certainly neither historically suspect nor traditionally disfavored. But united by its condition–military status–it was entitled to equal protection.

Kramer v. Union Free School District No. 15, supra, continued the process of guaranteeing equal protection of the laws to groups denied the franchise in particular elections for less than compelling state interests or by methods unnecessary to what may or may not have been compelling interests. There the Court invalidated a New York statute which limited participation in school district elections to those who 1) owned or leased taxable real property in the district, 2) were married to one who so owned or leased, or 3) were the parents of or had custody of a child enrolled in a local district school. Pointing out that the petitioner, a bachelor who lived with his parents, was interested in and affected by the outcome of the elections but ineligible to vote in them, as were senior citizens, boarders, clergy, and others, the Court held that this latter group was denied equal protection by the statutory limitation.

Finally, more recently this Court decided two "denial" cases of obvious relevance here. Both cases involved local elections to pass upon revenue bonds, *Cipriano v. Houma, supra* and general obligation bonds, *Phoenix v. Kolodziejski,* 26 L.Ed.2d 523 (1970), from which otherwise qualified voters who were not property-taxpayers were excluded. In both, this Court held the excluded groups were entitled to equal protection, and rejected various asserted

state interests proferred to justify denying a political voice to those groups. *Cipriano* and *Kolodziejski* are extremely important here because they are the first voting rights cases to apply an equal protection analysis to elections where citizens, instead of voting for public officials who will in turn determine public policy, are themselves passing directly upon questions of public policy. Moreover, in those two cases, this Court applied the rigorous Equal Protection standard, invoked to test infringements of the right to vote, and demanded a showing that the exclusion of some voters was necessary to advance compelling state interests.

These cases demonstrate the willingness of this Court to expand the categories of protected groups far beyond those stable classes traditionally the victims of discrimination, into an infinite number of situations involving the selective distribution of the franchise. They also demonstrate that this Court will not tolerate schemes designed to deny the vote completely to certain groups and individuals.

Relevant to this case is another doctrinal development, of more recent origin: the apportionment or one man–one vote cases. Beginning with the historic decision in *Baker v. Carr*, 369 U.S. 186 (1962), this Court has envinced an additional constitutional concern not merely with denial of a political voice to certain classes or citizens, but with *dilution* of that political voice. This second line of decisions was described by the California Supreme Court as follows:

> The second major area in which the high court has intervened involves state geographical districting systems which dilute the effectiveness of the franchise either directly or through the allocation of legislative representation. In order to insure that voting power remains precisely correlated with population, the court has abolished electoral systems which weighted votes in elections for statewide office; it has ordered that the districting of federal congressional seats and the apportionment of both houses of state legislatures be conducted on the

basis of substantial population equality among such units. Subsequent cases have insisted upon a rule of absolute equality of population and have extended the principle of "one man, one vote" to various units of local government. *The result of these decisions has been to equalize the effectiveness of participation in the political process. Westbrook v. Mihaly, supra* at 849. (footnotes omitted) (emphasis added).

Beginning in *Gray v. Sanders,* 372 U.S. 368 (1963), continuing in *Wesberry v. Sanders,* 376 U.S. 1 (1964) and culminating in *Reynolds v. Sims,* 377 U.S. 533 (1964) this Court developed the doctrine that each qualified voter is entitled to an equal voice in the political process. *Reynolds* was a doctrinal watershed where, building upon previous rulings which invalidated attempts to deny the franchise, this Court announced the rule that equal protection safeguarded against not only denial of the vote, but against dilution as well:

> Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections. A consistent line of decisions by this Court in cases involving attempts to deny or restrict the right of suffrage has made this indelibly clear. It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote. . . and to have their votes counted. . . . The right to vote can neither be denied outright . . . nor destroyed by alterntion of ballots . . nor diluted by ballot-box stuffing . . . Racially based gerrymandering. . .and the conducting of white primaries, . . .both of which result in denying to some citizens their right to vote, have been held to be constitutionally impermissible. And history has seen a continuing expansion of the scope of the right of suffrage in this country. The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that

> right strike at the heart of representative government. *And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise. Reynolds v. Sims, supra* at 554-55 (citations and footnotes omitted) (emphasis added).

The Court went on to spell out its concern with apportionment schemes which diluted the weight of a citizen's vote, depending on geographic residency:

> Overweighting and overvaluation of the votes of those living here has the certain effect of dilution and undervaluation of the votes of those living there. The resulting discrimination against those individual voters living in disfavored areas is easily demonstrable mathematically. Their right to vote is simply not the same right to vote as that of those living in a favored part of the State. . . . Weighting the votes of citizens differently, *by any method or means*, merely because of where they happen to reside, hardly seems justifiable.
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> Full and effective participation by all citizens in state government requires, therefore, that each citizen have *an equally effective voice* in the election of members of his state legislature. Modern and viable state government needs, and the Constitution demands, no less. 377 U.S. at 563-565 (emphasis added).

In numerous cases since then, the Court has utilized this equal voice doctrine, or one man one vote, to require almost absolute equality in population of legislative districts in order to insure that there will be no dilution of the electoral influence of each voter. See, *e.g.*, *Wells v. Rockefeller*, 394 U.S. 542 (1969). More relevantly, the dilution doctrine has also been applied to elections for local governing bodies, legislative or governmental. See, *e.g.*, *Avery v. Midland County*, 390 U.S. 474 (1968); *Hadley v. Junior College District*, 397 U.S. 50 (1970). In *Hadley*, the Court

summarized its prior rulings as establishing the principle that "a qualified voter has a constitutional right to vote in elections without having his vote wrongfully denied, debased or diluted" and that all voters had the right "to have their votes given the same weight as that of other voters." 25 L.Ed.2d at 49. The Court continued:

> This Court has consistently held in a long series of cases, that in situations involving elections, the States are required to insure that each person's vote counts as much, insofar as it is practicable, as any other person's. We have applied this principle in congressional elections, and local elections. The consistent theme of those decisions is that the right to vote in an election is protected by the United States Constitution against dilution or debasement. 25 L.Ed.2d at 49-50 (footnote omitted).

See also, *Kramer v. Union Free School District No. 15, supra* ("Thus, state apportionment statutes, which may *dilute* the effectiveness of some citizens' votes, receive close scrutiny from this Court. . . . No less rigid an examination is applicable to statutes *denying* the franchise to citizens who are otherwise qualified by residence and age." 395 U.S. at 626 [emphasis in original]).

As the Court's review of its precedents makes clear, it has been preoccupied with the equal protection ramifications of both denial and dilution of the right to vote. It has refused to tolerate the exclusion of voters from elections for public officials and, more importantly for this case, from elections where the voters are asked to pass directly upon public questions by approving or disapproving bond issues. And, the Court has also made it clear that it will be as vigilant against schemes which dilute the vote of particular citizens or groups. From these two separate doctrinal strands, a unifying principle emerges: the definition of those who will be entitled to participate in a particular election is subject to rigorous scrutiny to determine whether anyone has been improperly excluded, and once the electorate for any given election is defined in a consti-

tutional manner, each voter is entitled to an equal voice in the outcome.

This case presents the doctrinal watershed for the tying together of these two decisional strands. *Reynolds v. Sims* provided the occasion for this Court, building upon prior cases dealing for the most part with *denial* of the vote, to declare that dilution of a man's vote was equally offensive to the Equal Protection Clause. Here the Court has the similar opportunity, building upon its rulings in *Cipriano* and *Kolodziejski*, which foreclose the argument that equal protection does not apply to elections such as these, and applying the analysis of the reapportionment cases, to hold that the Equal Protection Clause which scrutinizes efforts to deny the vote in municipal bond elections, also interdicts the dilution of each man's vote in such elections, when he is called upon to pass on substantive issues of local government.

II. THE EQUAL PROTECTION ANALYSIS APPLIED HERE.

As indicated in Part I, *supra*, this Court's decisions in voting rights cases follow two main trends, for convenience referred to as denial cases, *e.g.*, *Carrington v. Rash, supra; Kramer v. Union Free School District No. 15, supra*, and dilution cases, *e.g.*, *Reynolds v. Sims, supra*. The Court has already held that the right to vote in local revenue bond or general obligation bond elections cannot be denied to non-property owners. The question here is whether the right to vote can be diluted by the extraordinary majority requirement. That this type of issue can be resolved by application of the principles set forth above has been recognized not only by the court below and by the California Supreme Court, but also by a three-judge federal court in Minnesota. See, *Rimarcik v. Johansen*, 310 F.Supp. 61 (D. Minn. 1970), *appeal filed*, 38 U.S.L.W. 3468 (May 5, 1970) (provision requiring fifty-five percent affirmative vote to adopt home rule charter amendment violates equal protection), *but see, Brenner v. Kansas City School District*, ___

F. Supp.___ (W.D. Mo. 1970), 39 L.W. 2122 (9/8/70), (two-thirds affirmative vote required to approve school tax levy and bond issue held not violative of equal protection).

Most of the courts dealing with extraordinary majority requirements have noted that although the factual bases of this Court's voting rights cases have been different from the pattern here, the principle enunciated in those decisions easily applies in this context.

A. The Classification and its Effect

One argument raised by those defending extraordinary requirements is that statutes such as this do not impose a classification, or if they do, the classification is not a discriminatory one since there is no disadvantaged class of people easily identifiable prior to an election, and each man's vote is fully counted. See, *Lance v. Board of Education of Roane County, supra* at 800 (dissenting opinion); *Westbrook v. Mihaly, supra;* see also, Comment, *Extraordinary Majority Voting Requirements,* 58 Geo.L.J. 411, 412 (1969). *Amici* submit, however, that schemes which impose extraordinary majority requirements do classify and discriminate against those who vote in favor of local financial measures, and do so without advancing any compelling state interest which might justify that discrimination See *Kramer v. Union Free School District No. 15, supra; Cipriano v. Houma, supra; Phoenix v. Kolodziejski, supra.*

That the constitutional and statutory arrangement below does classify voters into two distinct groups is persuasively demonstrated by the California Supreme Court:

> It appears obvious to us that section 18 implicitly creates two classes of voters: those who favor a proposed bond issue and those who oppose it. It is not essential that a classification appear in explicit terms on the face of the law. Nor is it necessary that those who are allegedly disadvantaged by the classification either constitute a class which is "objectively identifiable" prior to the election or that they share in common other characteristics, such as

> race, economic status or residence. It is sufficient that the class emerge from its inchoate state at the time of the election and that it be defined by the act of voting affirmatively on a bond issue proposition. The equal protection clause extends to the shared political interests of groups otherwise random and diverse. *Westbrook v. Mihaly, supra* at 850.

Indeed, in *Williams v. Rhodes*, 393 U.S. 23 (1968) and *Hunter v. Erickson, supra*, this Court applied an equal protection standard to vindicate the interests of citizens who did not constitute a readily identifiable class prior to the elections in question. A statute which required that sixty percent of those voting in an election for a Governor or state legislator must vote for the challenger in order for an incumbent to be defeated (arrangements which would presumably be based on rationales similar to the ones offered here) would certainly be found to effect a classification among voters.

Assuming then that these arrangements do classify the voters into two groups, does the classification have a discriminatory impact? It is no answer to contend that each voter casts a vote formally equal to every other voter. That is certainly true in a formalistic sense. But it was also true in the reapportionment cases. Each voter cast only one vote for a legislative candidate. But taken in the aggregate, the votes of certain classes of voters had a greater impact than the votes of other classes. That was the very essence of the discrimination. In *Reynolds v. Sims, supra*, this Court compared the total effect of malapportionment to an overt arrangement which accomplished the same ends:

> And, if a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted. It would appear extraordinary to suggest that a State could be constitutionally per-

> mitted to enact a law providing that certain of the State's voters could vote two, five or 10 times for their legislative representatives, while voters living elsewhere could vote only once. And it is inconceivable that a state law to the effect that, in counting votes for legislators, the votes of citizens in one part of the State would be multiplied by two, five, or 10, while the votes of persons in another area would be counted only at face value, could be constitutionally sustainable. 377 U.S. at 562. See also, *Gray v. Sanders, supra* at 379-380.

And yet this is precisely the effect of extraordinary majority arrangements. Although maintained through the mechanism of requiring a fifty-five or sixty percent or two-thirds affirmative vote, their effect is precisely the same as a procedure wherein although a simple majority would prevail, each negative vote were weighted one-and-one-half times each affirmative vote. It cannot be maintained that there is no dilution of the vote of those who cast an affirmative ballot. Dilution of a citizen's vote because of the way he votes is no more tolerable than dilution of his vote because of the area in which he votes. See *Carrington v. Rash, supra* at 94. The California Supreme Court had little difficulty recognizing the weighting effect of a two-thirds requirement:

> It does not require extended discussion to establish that the inevitable result of any extraordinary majority requirement is to give to one group of voters a greater influence on the outcome of an election than to another group of comparable size but opposite conviction. This is the functional equivalent of according to each person in the former group a vote of relatively greater weight precisely because of his position on the issue which is to be decided. In other words, a result identical to that produced by a two-thirds vote requirement could be achieved by requiring only a 50 percent affirmative vote for passage of bond issue propositions but providing that in tabulating the election results each negative vote would be multiplied by two while af-

> firmative votes would be counted at face value. Alternatively, those citizens who opposed a measure could be permitted to vote twice while those who favored it were limited to only one ballot. The biased structure of both of these voting schemes is perhaps more obvious than the discrimination inherent in an extraordinary majority vote requirement. The effect of each, of course, is identical. "If a State in a statewide election weighted the male vote more heavily than the female vote or the white vote more heavily than the Negro vote, none could successfully contend that the discrimination was allowable. [Citation]" (Gray v. Sanders, supra, 372 U.S. 368, 379, 83 S.Ct. 801,808.) Although the question of whether such discrimination is allowable has not been settled by the Fifteenth or the Nineteenth Amendment, we think it equally apparent that when a state weights the negative vote more heavily than the affirmative vote, no one can successfully contend that there is *no* discrimination. *Westbrook v. Mihaly, supra* at 851 (footnotes omitted).

And the three-judge court in *Rimarcik v. Johansen, supra,* correctly observed that the method by which the principle of one man, one vote is infringed may vary:

> The right protected in the one man, one vote cases is a person's right to have his vote be given equal weight to that of other voters. Whether the state denies this right by malapportioned districts or by some other means is not the controlling factor in determining whether the state has acted constitutionally. We believe the test is not the means by which the state has exercised its power to deny a person within its jurisdiction the equal protection of the laws, but whether the power has in fact been exercised. 310 F.Supp. at 67.

Again, if it took more than a simple majority to defeat an incumbent office-holder, could it seriously be maintained that those who voted for the challenger had not had their votes diluted and those who supported the incumbent not had their votes weighted.

B. Standard of Review

Once confronted with a discriminatory classification, the next task is to determine which standard of review should obtain in deciding whether the challenged discrimination nevertheless is tolerable. It is apparent that this aspect of any equal protection analysis can be crucial: discriminatory arrangements which have a rational relationship to a conceivable legitimate state purpose might not be found to be necessary to a compelling state interest. *Compare, McDonald v. Board of Election Commissioners of Chicago,* 394 U.S. 802 (1969) *with Kramer v. Union Free School District No. 15, supra.*

This Court has consistently indicated that statutes which deny or impair the right to vote are subject to careful scrutiny since the right to vote, either for elected officials, or in bond elections, is a fundamental constitutional interest. See, *e.g., Reynolds v. Sims. supra; Cipriano v. Houma, supra; cf. Dandridge v. Williams,* 25 L.Ed.2d 491 (1970). Accordingly, most of the courts which have considered the question have found that the right to vote on an equal footing in elections such as this comes within the purview of fundamental constitutional interests and can therefore be diluted only if compelling state interests are necessarily advanced by such dilution. See, *Lance v. Board of Education of Roane County, supra; Westbrook v. Mihaly, supra* at 852-54; *Rimarcik v. Johansen, supra* at 65.* As the court below pointed out,

> Certainly the right of the voter to equal protection, the right to protection against the dilution or debasement of the weight or force of an individual's vote, is fully as sound, sacred and important when he is voting on issues involving taxation, public reve-

*The three-judge court in *Brenner v. Kansas City School District, supra,* held that a two-thirds requirement for passing upon local bonds and tax levies passed constitutional muster under either the permissive or strict equal protection test.

> nue and the promotion of an adequate public school system, as when he is voting for the nomination or election of a constable, a state senator, a governor or any other public official to represent the voter in government. 170 S.E.2d at 790-91.

It is not surprising that the right to vote in such local elections would have been characterized as a fundamental interest invoking the strict equal protection standard. Such a rigorous standard is applied to efforts to infringe the right to vote for elected officials who will in turn determine the content of public policy. Where the voters themselves are called upon to pass directly upon such public issues, it would seem, *a fortiori*, that their right to vote is similarly a fundamental interest. In this type of election, the right to vote is in its most pristine form. Indeed, this Court has already implicitly resolved the question of how to categorize the voting right at stake here by applying the strict standard to schemes which denied certain classes of citizens the right to vote in local referendum elections on issues of public finance. See *Cipriano v. Houma, supra; Phoenix v. Kolodziejski, supra.* Unless there is some constitutional distinction between denying the vote in such elections and diluting it, a distinction which all the reapportionment cases would appear to refute, then the discrimination imposed here must be measured against the "compelling interest" standard, not the "reasonable relation" yardstick. As this Court stated in *Kolodziejski,*

> Presumptively, when all citizens are affected in important ways by a governmental decision subject to a referendum, the Constitution does not permit weighted voting or the exclusion of otherwise qualified citizens from the franchise. 26L.Ed.2d at 527.

Therefore, the burden of demonstrating that the "weighted voting" provisions necessarily advance compelling state interests is on the proponents of extraordinary majority devices.

C. The Compelling Interest Analysis

The main justification offered for giving a minority of the community the power to veto additional public expenditures is that such arrangements promote "fiscal responsibility" and provide against unwise indebtedness. The California Supreme Court has persuasively demonstrated that the stability of local general obligation bonds is completely unrelated to whether an extraordinary majority requirement is imposed as a precondition to their issuance. It has detailed the history of such requirements in local financing, the sophistication of public officials and procedures and private investors, and the alternative means of financing which are occasionally available. It has demonstrated that a decision to approve a bond issue and undertake a governmental project is not significantly different from other public policy questions so as to justify requiring more than a simple majority to approve them. The analysis is contained in the *Westbrook* opinion at 87 Cal Rptr. 855-863, and *amici* respectfully refer the Court to it. There has been no demonstration in this case that the situation in West Virginia is not amenable to the same analysis.

We would provide some additional observations. First, to the extent that the sixty-per cent requirement is intended to advance the interests of property owners who, arguably, might ultimately be called upon to make good on local obligations, this Court has already ruled such interests inadequate to sustain a denial of equal protection in the distribution of the vote. In *Phoenix v. Kolodziejski*, where the issue was denial of the vote to non-property owners in a bond election, this Court stated:

> Third, the justification for restricting the franchise to the property owners would seem to be strongest in the case of a municipality which, unlike Phoenix, looks only to property tax revenues for servicing general obligation bonds. But even in such a case the justification would be insufficient. 26 L Ed 2d at 528.

Second, West Virginia law contains various provisions to control local debt and tax levies. For example, Article 10, section 1 of the Constitution provides specific limits, based on a proportion of valuation, on the tax which can be imposed on different categories of property. Local taxes can be increased, but only for a period of three years and not more than 50% of the specified maximum rate. (Section 20 allows additional tax levies by school districts for up to 5 years and 100%.). Article 10, section 8 provides that no political entity may become indebted for more than 5 percent of the value of its taxable property. These provisions serve to protect local financial stability and thus reduce the need for the extraordinary majority requirements.

With regard to such problems as voting irregularities or improper use of public facilities to support one side of the issue, one would assume that the state could find less drastic means of dealing with these problems than diluting the right to vote of a majority of the community. In addition, if, as has been argued, decisions on tax and bond issues are so complicated so as to require some kind of "governor" on the majority, then the solution is to withhold the vote completely, not to grant it in a discriminatory manner.

Finally, much has been said about whether the Equal Protection Clause requires "majority rule" in all our governmental institutions. Proponents of the type of weighted voting at issue here have pointed to numerous other provisions in the Federal and state constitutions which depart from a majoritarian principle. But most of the provisions deal either with the management of internal legislative affairs, the distribution of power between branches of government, or the procedures for organic changes in the instrumentalities of government, while the historic weight of precedents which bear on the issues here involve denials or infringements of the right to vote for officials or on public issues. Whether any of those provisions could withstand the scrutiny of the analysis set forth above does not have to be determined here. What does have to be decided is whether the dilution of the voice of a majority of the com-

munity in elections such as these is necessary to advance specific compelling state interests. In resolving that question, this Court should recall its observation in *Reynolds v. Sims, supra:*

> Logically, in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State's legislators. To conclude differently, and to sanction minority control of state legislative bodies, would appear to deny majority rights in a way that far surpasses any possible denial of minority rights that might otherwise be thought to result.
>
> * * *
>
> And the democratic ideals of equality and majority rule, which have served this Nation so well in the past, are hardly of any less significance for the present and the future. 377 U.S. at 565-66.

We submit that those ideals are no less applicable here.

III. *HUNTER V. ERICKSON*: AN ALTERNATIVE THEORY

In the previous discussion, *amici* have contended that the decision below can be upheld within the framework of this Court's voting rights cases and their principle that the right to vote can neither be denied nor diluted unless such discrimination is necessary to advance compelling state interests. We think that there is an alternative theory available here, involving a slightly different perspective on this Court's decisions, and premised on the concept enunciated in *Hunter v. Erickson*, 393 U.S. 385 (1969) that arrangements which "disadvantage" the law-making interests of certain groups are constitutionally suspect.

A. *Hunter v. Erickson:* The Sophistication of Means, and This Court's Response

The decisions of this Court protecting the franchise under the Equal Protection Clause have invalidated schemes of discrimination that were, for the most part, simple and obvious. It is unimaginative, if straightforward, simply to refuse to register Negroes. *Nixon v. Herndon, supra.* It is only a little more complicated to exclude blacks from the political process by means of all-white primary elections. *Terry v. Adams, Smith v. Allwright, Nixon v. Condon, supra.* Nor is it very subtle to redraw boundary lines to exclude the black vote. *Gomillion v. Lightfoot, supra.* Thus the most traditional function of the Equal Protection Clause in securing the franchise—guaranteeing the vote to traditionally disfavored groups such as blacks—has been fulfilled in a relatively obvious fashion.

But there are many ways to discriminate against, for example, the black vote, of which outright denial, exclusion from primaries, or exclusion from districts are only the most crude examples. There are many more sophisticated schemes.* For example, distinctions can be drawn that are seemingly unrelated to identifiable voters, but related instead to the issues in which those voters are interested.

Thus in *Hunter v. Erickson,* 393 U.S. 385 (1969), the Court was confronted with a new and very different scheme of discrimination. The City of Akron, Ohio, had by majority vote amended its charter to attack *not Negroes, but the interests of Negroes.* The amendment provided that before any ordinance regulating the sale, lease or sublease of real property on the basis of race, color, religion, national origin or ancestry could become effective, it must be approved by a majority vote at a regular or general election.

---

*One such arrangement, the use of at-large election districts to deny political power to minority groups, is currently under scrutiny by this Court in Whitcomb v. Chavis, No. 52, O.T. 1970; Ruckelshaus v. Chavis, No. 53, O.T. 1970.

Thus the questioned provision isolated fair housing ordinances, a common interest of the disfavored class, and made the realization of that interest in the law a special and more difficult requirement.

In an eight-to-one decision this Court held the charter provision invalid as a denial to Akron's Negros of the equal protection of the law. Noting that other ordinances–even other housing ordinances, such as those concerned with age or sex or tenants with pets–were not subjected to the extra hurdle of the charter provision, Mr. Justice White, writing for the Court, concluded that the provision "made it substantially more difficult to secure enactment" of fair housing ordinances, 393 U.S. at 390, than other ordinances. The precise nature of the impermissible distinction bears close reading:

> Section 137 thus drew a distinction between those groups who sought the law's protection against racial, religious, or ancestral discriminations in the sale and rental of real estate and those who sought to regulate real property transactions in the pursuit of other ends. Those who sought, or would benefit from, most ordinances regulating the real property market remained subject to the general rule . . . 393 U.S. at 390.

This extra burden placed in the way of the lawmaking interest of Negroes constituted, in the Court's view, another method of disadvantaging a disfavored group:

> . . .the State *may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf* than it may dilute any person's vote or give any group a smaller representation than another of comparable size. Cf. Reynolds v. Sims . . . Avery v. Midland County. . . 393 U.S. at 393 (emphasis added).

Thus the Court fulfilled its promise, made in the context of equal protection in *Reynolds v. Sims, supra* at 563, that "the Constitution forbids 'sophisticated as well as simple-minded modes of discrimination.' "

B. The Sixty Percent Vote Requirement Violates the Equal Protection Clause Because it "Disadvantage[s] a Particular Group by Making it More Difficult to Enact Legislation in its Behalf."

It was earlier suggested that two closely parallel lines of cases form the basis for securing the franchise under the Equal Protection Clause. The first, including *Condon*, *Herndon*, *Allwright*, *Gomillion*, and *Terry*, protect the traditionally disfavored groups, such as blacks, from direct, simple invasions of their right to vote. The second, including *Harper*, *Carrington*, *Reynolds*, *Gray*, *Kramer*, *Cipriano*, and *Kolodziejski* protect against the same invasions those classes that are neither historically obvious nor permanently fixed, but are established by such shifting factors as poverty (*Harper*), military status (*Carrington*), geography (the reapportionment cases), and by specific statutory exclusions such as non-owners, non-renters, and non-parents (*Kramer*) or non-property taxpayers (*Cipriano*, *Kolodziejski*).

Hunter v. Erickson properly belongs at the end of the first line of cases, protecting as it does the most traditionally disfavored group, but from a quite novel form of discrimination in the law-making process. The cases presently before this Court are, for the second line of cases, the exact parallel of *Hunter*.

Here a broad, shifting group—those dependent on local government's bonded indebtedness and tax revenues—have had their interest identified in the West Virginia Constitution and statutes and a special obstacle, the sixty-percent requirement, places in the way of its realization in the law-making process. Similar law-making interests, even those involving long term local indebtedness and local financing, can be pursued by less onerous means. Thus the logic of *Hunter* is squarely in point.

As indicated above, the only significant effect of a sixty-percent requirement is that it prevents passage of numerous bond issues and revenue financing measures desired by a majority of the voters in a community; such a requirement

is not necessary to advance the goals of fiscal stability, since other mechanisms have developed to safeguard those goals. Yet the provisions in question isolate only certain types of municipal spending. Other kinds of long-term indebtedness can be incurred without having to be subjected to the sixty-percent requirement. In West Virginia, revenue bonds are apparently not within the meaning of the general obligation bond provisions, see *State ex rel County Court of Marion County v. Demus*, 135 S.E.2d 352 (Sup. Ct. of App. 1964), and thus utility projects can be financed without clearing the sixty-percent hurdle.

But those who desire civic improvements such as schools, parks and other public improvements are subject to the historical suspicion of "municipal extravagance." Whether parents with school children, teachers, or simply citizens concerned about the quality of education or recreation, they are bound together by the common element that they depend, for the realization of their interest, on the credit and finances of the local community. The constitutional and statutory arrangements here isolate their interests and place the extraordinary majority requirement in the way of their enactment into law. This is the essence of the technique–extra obstacles to the legislative interests of a given group–condemned in *Hunter*. It is no more tolerable here than it was in *Hunter*.

CONCLUSION

For the reasons set forth herein the judgment of the court below should be affirmed.

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No. 96

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

A. T. GORDON, ET AL.,
Petitioners,

VS.

GRANVILLE H. LANCE, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

We will attempt in this Reply to point out the irrelevancies relied upon so heavily by Respondents and many of the *amici curiae* who have filed briefs herein. We will discuss also the recent actions of this Court which we deem material to the issue and the decisions of various lower Courts which have been handed down since the writ of certiorari was issued in this case.

ROANE COUNTY SCHOOLS

The condition of the school facilities in Roane County, West Virginia, has been the subject of substantial com-

ment in the brief of Respondents (P. 3) and in several of the *amicus* briefs. It is said that these facilities are in poor condition and it is suggested that this circumstance might have some relevancy to the question before the Court. We demur. We ask that all such discussion be completely ignored as irrelevant. It cannot be said with any logic that the condition of this school system, whatever it is, has any bearing on the question of whether the voters at a special election were denied equal protection by the extraordinary majority requirements in dispute. If there were an assertion that some student or group of students was being denied equal protection of the laws by reason of the condition of these school facilities, however untenable this might be, then such consideration might become relevant. There is no such assertion in this case and none could be made with any degree of sincerity. We concede that the schools of Roane County could bear improvement and we suspect that the same could be said of the schools in every other county throughout the nation. We deplore, however, a discussion of this circumstance here because it is totally unhelpful to a resolution of the issue before the Court.

Much is made of the fact that no school bonds have been issued in Roane County since 1946. Nothing has been said about the possible political considerations which could have motivated a sufficient number of voters to reject the various proposals since that date. For example, it could be that a lot of money was misappropriated or stolen in 1946; it could be that many of the people involved in such an episode are still prominent in the political and business affairs of the county; and it could be that the local people have a lack of confidence in the administrators of this school system. All

of these hypothetical considerations could have a bearing on the political question of why no bonds have been authorized since 1946 in Roane County, but none of this discussion has any relevancy to the question before the Court. Certainly it could not be said that a voter in the 1968 election was deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment because no bonds have been authorized in Roane County since 1946. We urge the Court to totally disregard all of these extraneous matters and the emotional appeals made in conjunction therewith.

EXTRAORDINARY MAJORITY REQUIREMENTS ARE BASED ON NEUTRAL PRINCIPLES

Respondents herein and many of the *amici curiae* who have filed briefs in supports of the Respondents position herein persist in analogizing this case to the "one man, one vote" cases in an attempt to demonstrate that the "yes" voters in Roane County election were, somehow, discriminated against. The distinctions between all of the "one man, one vote" cases and this case are so numerous and so obvious that we believe it totally unnecessary to enumerate them here. The Supreme Court of California, however, in an amazing opinion in the consolidated actions styled *Westbrook* v. *Mihaly*, 2 Cal. 3d 765, 471 P. 2d 487, decided after the issuance of the writ herein, held that the extraordinary majority requirements created classification of the electorate and that it was sufficient for the "class" to come into being at or after the election. We believe that this opinion demonstrates with extreme clarity the strong undercurrent of emotional and purely political considerations which have pervaded discussions relating to the issues herein. Certainly, if the law does not result in a pros-

pective classification of the voters along discriminatory and constitutionally impermissible lines, the law is valid; and if the "class" comes into being at or after the election, there is no "class".

In these cases, every voter, as he enters the voting booth, has *an equal opportunity with every other voter to affect the outcome of the election,* whether he decides to vote "yes" or "no". There can be no semblance of discrimination in having a rule of decision which requires more than a majority for the authorization of new legislation. Every man stands equally before such a law.

In this connection, we strongly commend to the Court's attention the various discussions of these questions contained in 58 *Georgetown Law Journal* 411 (November 1969), and 56 *Virginia Law Review* 295 (March 1970). We also urge the Court to consider carefully the opinion of the Three-Judge District Court of the Western District of Missouri in the consolidated actions of *Brenner* vs. *Kansas City School District,* Case No. 17660-1, decided August 14, 1970. This case held that the two-thirds majority requirements of the Missouri Constitution and statutes necessary to the authorization of school tax levies and school bonds were valid and did not violate the equal protection clause. Since this opinion has not yet been published, so far as we can learn, we desire to rely for our argument upon the conclusions reached and the reasons advanced in support thereof by that Court. Accordingly, we quote at length from the opinion in that case.

On pages 12 through 14 of that opinion we find the following:

> "The primary difficulty with plaintiffs' 'one-man, one-vote' argument is that it fails to take into ac-

count the factual situations presented in the apportionment cases in which that principle was articulated and applied. Those cases related to elections in which representatives are chosen to represent the people. The weight of votes cast in one district were in fact diluted or enhanced when compared to the votes cast for the same representative elected from another district. *Reynolds* v. *Sims*, 377 U. S. 533 (1964), was explicitly based on the rationale that where such overweight or underweight results from the accident of particular voters' place of residence, the resultant dilution 'impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race, *Brown* v. *Board of Education*, 347 U. S. 483, or economic status, *Griffin* v. *Illinois*, 351 U. S. 12, *Douglas* v. *California*, 372 U. S. 353 (377 U. S. at 566).

"But the Court explicitly recognized in *Reynolds* v. *Sims* that 'our constitutional system amply provides for the protection of minorities by means other than giving them majority control of state legislatures.' A particular State's determination that no school district shall issue school bonds or increase its tax levy unless two thirds of the voters approve simply does not involve questions which relate to the majority control of any legislative body. The purpose of a school referendum simply is not concerned with the election of any public official.

"The type of election involved falls in the general category of elections in which the people are authorized by State law to approve or disapprove the taking of particular governmental action recom-

mended by their elected representatives. Such a referendum election, the theory of which was probably based on town meeting experience, was virtually unknown at state level at the time the Constitution was written.

"In his dissent in *Kramer* v. *Union School District*, 395 U. S. 621, 640 (1969), Mr. Justice Stewart made the point that 'despite the Court's undifferentiated references to what it terms "the franchise," ' it should be emphasized that 'we are dealing here, not with a *general* election, but with a *limited special-purpose election*'. The per curiam opinion of the Court in *Cipriano* v. *City of Houma*, 395 U. S. 701, 704 (1969), used the similar 'limited purpose election' language. Mr. Justice White, writing for the majority in *Phoenix* v. *Kolodziejski*, — U. S. — (1970), No. 1066, October Term 1969, decided June 23, 1970, but not yet reported, 38 L. W. 4511, (399 *U. S.* 204 [citation supplied]), carefully described a school bond election as 'a governmental decision subject to a referendum.' In his dissenting opinion in that case, Mr. Justice Stewart raised the question of whether 'this case really involved an "election," that is, a choice by popular votes of candidates for public office under a system of representative democracy, . . .'

"The important consideration which must be kept in focus is that a school bond or levy election is an entirely different sort of political process than that involved in the election of a public official. No actual classification of groups of voters is involved in a school referendum election. No one even knows who is going to vote 'yes' or who is going to vote

'no.' No one knows how the election will be decided until the votes are counted.

"We quite agree with the Comment in 58 Georgetown Law Journal, 411, 418 (November, 1969) which concluded that 'the reapportionment cases as a class can be distinguished factually on the ground they involved only the right of the electorate to choose representatives.' It was, we believe, properly stated that:

" 'The reapportionment cases ultimately speak to the issue of equality of representation, not equality of vote. To insure equal representation, the vote of each person in every constituency must be of equal weight, a result attainable only when the constituencies themselves are equal in terms of population. In such instances, full and effective participation by all citizens in the political process demands application of the one man-one vote rationale. In the case of a bond referendum, however, the principle is inapposite, since the voters are deciding only whether they should tax themselves; full and effective participation already is guaranteed because the voters are exercising the franchise directly, rather than through representatives casting vicarious votes in the legislature. Since the consequences of electing a representative differ significantly from those of a bond referendum, what is necessary to guarantee fairness in one should not be applied automatically to the other.'

"We conclude that the Supreme Court's articulation of the 'one-man, one-vote' apportionment principle does not carry with it, either implicitly or explicitly, a federal Constitutional command that all State school bond and tax levy elections must

be decided by a simple majority vote of the voter participating in such an election."

We also adopt the reasoning advanced on pages 29 through 34 of the *Brenner* opinion:

"We believe our determination of this case is consistent with two recent, but generally unnoticed decisions of the Supreme Court. Those cases are *Turner* v. *Clay*, 397 U.S. 39 (1970), decided February 4, 1970; and *Adams* v. *City of Colorado Springs*, October Term 1969, No. 1522, — U.S. —, decided June 22, 1970, but not yet reported, 38 L.W. 3506 (see 26 L. Ed. 2d 555 [citation supplied]).

"In *Turner* v. *Clay* the Supreme Court granted motions to dismiss the plaintiffs' pending appeal 'for want of a substantial federal question.' The appeal had been taken from the decision of the Supreme Court of South Carolina in *Clay* v. *Thornton*, (Sup. Ct. of So. Car., 1969) 169 S.E. 2d 617.

"In *Adams* v. *City of Colorado Springs*, the Supreme Court summarily affirmed the three judge court decision of the United States District Court for the District of Colorado which denied plaintiffs relief in *Adams* v. *City of Colorado Springs*, (D. Colo., 1970) 308 F. Supp. 1397. (Judgment affirmed, 26 L. Ed. 2d 555, June 22, 1970 [citation supplied]).

"Stern and Grossman point out in their Supreme Court Practice, Sec. 4.28, p. 197, that 'The Court is . . . deciding a case on the merits when it dismisses for want of a *substantial* federal question, or affirms summarily'. It is therefore relevant and important

to examine the questions presented and decided on the merits in these two recent Supreme Court cases.

"The question presented in *Clay* v. *Turner,* as stated in the Jurisdictional Statement filed in the Supreme Court, was: 'Does . . . the South Carolina Constitution of 1895 as interpreted and applied by the South Carolina Supreme Court to require more votes for the incorporation of a city than a majority of those voting in an election for incorporation deprive the majority of those voting, including appellants, of the Equal Protection of the Laws as guaranteed by the Fourteenth Amendment to the United States Constitution?'

"An area designated in South Carolina as North Charleston sought incorporation. There were 16,900 electors residing and entitled by law to vote within that area. At the incorporation referendum election only 7,315 voters cast ballots; 4,572 voted 'yes,' the remainder voted 'no.' The South Carolina Supreme Court stated that 'it is apparent that, while a majority of those voting voted favorably, a majority of 16,900 qualified electors in the area did not cast ballots in favor of incorporation.' The Supreme Court of South Carolina explicitly rejected the argument that South Carolina, having determined to ascertain consent to incorporate by way of an election, must also apply Lord Mansfield's presumption that all who absent themselves from an election must be deemed to assent to the expressed will of the majority of those voting. Plaintiffs argued that the trial court's failure to do so violated the Equal Protection Clause of the Fourteenth Amendment. It was argued that the construction given the South

Carolina Constitution, which sustained the extraordinary majority ground rule, permitted the State 'to add the "non-votes to the negative votes cast" . . . thereby diluting the votes of those persons voting for incorporation.'

"The underlying assumption upon which plaintiffs' argument in *Clay* v. *Turner* was based was basically the same as the underlying assumption upon which plaintiffs' argument in this case is based. Both proceed on the notion that if a State utilizes an election for the purpose of obtaining the approval of the qualified voters for a proposed governmental action, as distinguished from the election of a public official, there is something in the Constitution or in the Equal Protection Clause of the Fourteenth Amendment which somehow prohibits such State from requiring any majority other than a simple majority. The South Carolina Supreme Court disposed of plaintiffs' argument that the 'yes' votes would be 'diluted' by stating that:

> " 'The foregoing argument is based upon the principles announced by the United States Supreme Court in the recent reapportionment cases, citing *Reynolds* v. *Sims* . . . among others. Their principles have no application here.'

"The Jurisdictional Statement filed by appellants in the Supreme Court in *Turner* v. *Clay* shows that the rationale of the argument there presented was, in essence, the same as the argument plaintiffs present to this Court. Both arguments attempted to use the language of *Kramer*—'Once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment'—as a spring-

board for their respective 'one-man, one-vote' argument. Appellants in *Turner* v. *Clay* argued in their Jurisdictional Statement filed in the Supreme Court that 'the principle of one-man, one-vote is a fundamental right;' that under the South Carolina law 'the right of franchise has been given to the people but has been subjected to limitation by the number of votes required;' that the South Carolina Supreme Court's application of the South Carolina constitutional extraordinary majority requirement 'has resulted in the "debasement or dilution" of the vote of those voting in favor of incorporation;' and that 'under the actual facts of this case, each negative vote has been given the effect of one and two-thirds affirmative vote.'

"In the Supreme Court the appellants in the South Carolina case, as do plaintiffs in this case, relied upon *Lance* v. *Roane County Board of Education*, (Sup. Ct. App., W.Va., 1969) 170 S.E. 2d 783, cert. granted *sub nom. Gordon* v. *Lance*, 397 U.S. 1020 (April 6, 1970), decided by the West Virginia Supreme Court last year.

"'Appellees' motions to dismiss in the Supreme Court were based on the express ground that the appeal did not present 'a substantial federal question.' Appellees contended that South Carolina had not in any manner limited 'the right of franchise of any elector' and that the South Carolina constitutional provision related to matters which 'rest in the absolute discretion of the State of South Carolina and are matters of State interest only.'

"It is our view that the Supreme Court's action in granting the motions to dismiss in the South

Carolina case for want of a substantial federal question, at least implicitly, rejected the rationale upon which plaintiffs' Equal Protection Clause claim in this case is based. This Court is under duty to give appropriate deference to the Supreme Court's action on the merits in *Turner* v. *Clay*.

"*Adams* v. *City of Colorado Springs* involved a quite different factual situation but the legal principles involved were the same. The Colorado General Assembly passed a statute which permitted some, but not all, Colorado municipalities to annex contiguous territory only when approved by a majority vote of the qualified electors in the territory to be annexed. Judge Doyle, in his opinion for the three-judge court, stated that 'plaintiffs concede that the Colorado General Assembly is empowered to create annexation machinery without granting the right to vote, but maintains that when the Assembly extends the franchise to one group it must extend the same right to another group, absent a compelling public reason.' Judge Doyle stated:

> " 'Plaintiffs seek to equate their position with that of the plaintiffs in the several voting rights cases. *Cipriano* v. *City of Houma*, 395 U.S. 701, 89 S. Ct. 1897, 23 L. Ed. 2d 647 (1969); *Kramer* v. *Union Free School Dist. No. 15*, 395 U.S. 621, 89 S. Ct. 1886, 23 L. Ed. 2d 583 (1969); *Carrington* v. *Rash*, 380 U.S. 89, 85 S. Ct. 775, 13 L.Ed. 2d 675 (1965); *Lucas* v. *Forty-Fourth General Assembly*, 377 U.S. 713, 84 S. Ct. 1459, 12 L. Ed. 2d 632 (1964); *Reynolds* v. *Sims*, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964); and *Gray* v. *Sanders*, 372 U.S. 368, 83 S. Ct., 801, 9 L. Ed. 2d 821 (1963). [308 F. Supp. at 1402].'

"The three-judge court disposed of that argument by concluding that:

> " 'On its face this argument appears to have merit in that the right to vote poses a sensitive constitutional issue demanding scrupulous evaluation. However, on a closer look, it does not appear that the plaintiffs' rights are of the kind that have been upheld by the Supreme Court. . . .
>
> " 'Although we concede that the plaintiffs' case has equitable appeal, they have not demonstrated a violation on the Fourteenth Amendment of the Constitution in terms of either inequality or due process. Hence, their claim must fail.'

"The argument in the Jurisdictional Statement filed in the Supreme Court by appellant plaintiffs was based on the same cases and the same basic rationale as those relied upon by plaintiffs in this case. The appellants in the Colorado Springs case contended in the Supreme Court that under 'the whole line of cases from *Baker* v. *Carr* through *Kramer* and *Cipriano* [a] substantial federal question is presented.' Appellees, in their Motion to Dismiss or Affirm in the Supreme Court contended that 'the cases cited by Appellants in this Jurisdictional Statement alleging invidious discrimination deal with legislative apportionment and voting rights' and are therefore 'irrelevant . . . and inapposite.'

It is our view that the action of the Supreme Court summarily affirmed the three-judge court is consistent with the view we have expressed in regard to this case and that we must give appropriate weight to the Supreme Court's action on the merits in *Adams* v. *City of Colorado Springs.*"

Furthermore, we wish to specifically adopt the language of that Court appearing on page 36 of the opinion as follows:

> "This Court recognizes that there are many who view the sometimes slow working of the political processes of American government with great impatience. At least some have come to look upon the judicial branch of the government as an available means to speed the process of what many may view as reform. But all must recognize that neither the Constitution nor the courts which construe it are a panacea for all the problems which our States and Nation face.
>
> "The Constitution of the United States is an enduring instrument of government which permits the States to indulge in the widest area of experiment with ideas of local government. No court can properly apply its personal notion of whether a particular idea is or is not in the public interest. A State may adopt a wide range of constitutionally permissible ideas as a part of its declared public policy. A court may not properly substitute its personal judgment as to whether such an idea is good, bad, or indifferent. It may only determine whether the incorporation of an idea into law is prohibited by the Constitution of the United States or any of its Amendments. And that is all we have done in this case."

Another more recent case has also upheld the validity of extraordinary majority requirements in school bond elections. In the case of *Thurston, et al.* vs. *Greco, et al.*, Case No. 41444 in an opinion filed September 24, 1970, and not yet reported, the Supreme Court of the State

of Washington upheld the 60% requirements of the Constitution and the statutes of that state. This Court could find no discrimination in such a provision of law.

CONCLUSION

In view of all of the foregoing we submit that an extraordinary majority requirement in a special election such as that in the instant case is based upon neutral principles, that such a requirement has nothing to do with discrimination, invidious or otherwise, that it creates no classification of people, and that the Fourteenth Amendment neither requires majoritarian principles nor prohibits extraordinary majority requirements in such elections. For these reasons, we respectfully urge that the judgment of the Supreme Court of Appeals of West Virginia be reversed.

Respectfully submitted this 17th day of October, 1970.

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1969

No. 1244

A. T. GORDON, *et al.*, *Petitioners*,

v.

GRANVILLE H. LANCE, *et al.*, *Respondents*.

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF WASHINGTON AND G. KEITH GRIM AS AMICI CURIAE ON BEHALF OF PETITIONERS HEREIN

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1969

No. 1244

A. T. GORDON, *et al.*, *Petitioners,*

v.

GRANVILLE H. LANCE, *et al.*, *Respondents.*

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF WASHINGTON AND G. KEITH GRIM AS AMICI CURIAE ON BEHALF OF PETITIONERS HEREIN

The Attorney General of the State of Washington and G. Keith Grim join to appear as *amici curiae* and have filed herewith the written consent of all parties to this action in accordance with Rule 42 of the Rules of the Supreme Court of the United States. This brief is submitted in support of the position of the petitioners.

INTEREST OF G. KEITH GRIM AND THE ATTORNEY GENERAL OF THE STATE OF WASHINGTON

The State of Washington, and all its citizens, have a direct and substantial interest in the outcome

of this action because of the similarity of the West Virginia constitutional provisions and those of the Washington Constitution and implementing statutes. Article VII, Section 2, and Amendment 17 to the Washington Constitution provide that the aggregate of tax levies upon real and personal property by all taxing districts shall not exceed 40 mills on the dollar of assessed valuation in any year, but that the imposition of levies in excess of the 40 mill limitation may be authorized by an affirmative vote of sixty percent of the voters of any taxing district. Article VIII, Section 6, and Amendment 27 to the Washington Constitution require taxing districts to obtain a sixty percent affirmative vote before becoming indebted in excess of specified percentages of the value of taxable real property in the taxing district. Clearly this Court's disposition of the present action will directly affect the validity of these provisions.

The constitutionality of the supermajority laws for taxing measures in Washington was questioned in *Thurston v. Greco*, an action arising from the failure of a special levy and a bond authorization in the City of Tacoma to receive a 60% affirmative vote although they received more than a bare majority. The State of Washington, by its Attorney General, was a party to that litigation and urged that the Wash-

ington Supreme Court uphold these rules. It was joined in this position by G. Keith Grim, appearing as *amicus curiae* on behalf of defendants therein. On September 24, 1970, the Washington Supreme Court, in a 7-1 opinion, upheld the supermajority vote requirements of Washington's taxing rules. *Thurston v. Greco*, 78 W.D.2d 421, ... P.2d ..... (1970).*

The people of the State of Washington have long held and often affirmed their determination to limit property taxation as a means of generating governmental revenue. They have implemented this determination by the maintenance of a ceiling upon the imposition of such taxation, which ceiling should be overridden only upon a convincing showing to the voters of a taxing district that levies in excess of that ceiling were essential. Such a convincing showing of need would have been made, said the people, if three-fifths of their number voting at a tax authorization election approved the imposition of additional property taxation. The State of Washington, through its Attorney General, and G. Keith Grim join in sub-

*Two cases involving the validity of these same supermajority rules, but involving the failure of taxing measures to receive a 60% majority in other taxing districts, were heard in May, 1970 by a three judge federal panel. *Gaudette v. Peterson*, No. 3328 (E.D. Wash., N.D.); *Nelson v. Evans*, No. 8633 (W.D.Wash., N.D.). In an opinion rendered June 3, 1970, this panel stayed proceedings pending the state court determination in *Thurston v. Greco* and noting that, in any event, this Court's determination in the present suit would precede any review of the panel's determination in the cases before it.

mitting this brief as *amici curiae* in support of the position of the petitioners in their effort to uphold the constitutionality of such measures as valid tax-limitation devices.

SUMMARY OF ARGUMENT

The West Virginia supermajority vote requirements at issue in this case, like the similar Washington provisions, do not discriminate against "persons" as proscribed by the equal protection clause. Rather, if anything, they discriminate against the passage of a taxing measure when submitted by a taxing district for popular approval. This type of discrimination, assuming it can be termed as such, is not within the ambit of equal protection considerations.

If this Court finds these supermajority vote provisions do effect a classification of "persons," it must then determine whether such a classification is reasonably and rationally related to the achievement of a proper governmental purpose. Washington's experience with its supermajority vote requirements demonstrates that they are useful tools in limiting the onerous burdens which may be imposed on property owners by the unrestricted access of government to property taxation. In permitting property taxation in certain instances only when a meaningful

plurality of the voters have been convinced by a taxing district of the necessity of such additional levies, the supermajority vote provisions serve as valid and effective, and constitutional, tax-limitation devices.

ARGUMENT

In reaching its decision in this case the Court first must determine whether the supermajority vote requirements here at issue fall within the ambit of the equal protection clause of the 14th Amendment—that is, whether they effect a classification of "persons" as required by that clause. Secondly, if the first determination is in the affirmative, the Court must consider the test to be applied to ascertain whether the classification effected by the supermajority vote requirements is constitutionally acceptable—that is, whether it must be proven necessary to promote a compelling state interest or merely rationally related to the achievement of a permissible state objective. In order finally to examine these supermajority vote requirements in the light of the legal standard thus selected, the history and purposes of such requirements are not only relevant but essential to the Court's deliberation. We believe, therefore, that the Court could profit in this regard from a concise summary of Washington's experience with its analogous supermajority provisions.

I. Preliminary Question—Do the Supermajority Vote Requirements Classify "Persons" as Required by the Equal Protection Clause?

It should be noted initially that the equal protection clause applies only "to any person" discriminated against by state action. The clause has traditionally been applied to situations in which there could be no doubt that certain persons were detrimentally affected by the classification being questioned. Often these classifications have resulted in a discrimination based upon such factors as race, sex, religion, property ownership or wealth. Others, such as those considered in the reapportionment decisions, discriminated against persons geographically by diluting the value of their votes in permitting malapportioned electoral districts.

These provisions on the other hand, do not constitute a classification of "persons." Without question these requirements treat each qualified voter exactly the same regardless of who he is. He can vote either in favor of or in opposition to a taxing measure. Like every other voter, he is entitled to cast one vote at that special election. His vote is counted as but one vote. These supermajority rules established by the people simply require more affirmative votes than a simple majority to validate a special tax. If there is any discrimination effected by the super-

majority requirements, it is discrimination not against "persons" but rather against the passage of an issue authorizing a taxing district to incur debt or impose levies above stated limits. But the equal protection clause concerns itself with fair treatment of people. It does not speak to discrimination against the passage of taxing issues or to political decisions. In other words, the equal protection clause does not encompass a constitutional requirement that a bare majority must suffice as to taxing propositions submitted to eligible voters for their decision.

II. The Supermajority Vote Provisions Meet the Requirements of the Equal Protection Clause if They Are Found to be Relevant to the Achievement of a Permissible Governmental Purpose.

This Court may conclude that the provisions at issue result in a classification of "persons," thus bringing them within the scope of the equal protection clause. The resolution of this question will not automatically indicate the outcome of the case. These provisions must not only classify persons but must classify them in a constitutionally impermissible manner before they can be declared invalid by this Court.

The traditional scope of the equal protection clause with regard to statutory classifications has been described as follows:

> "To be sure, the constitutional demand is not a demand that a statute necessarily apply equally to all persons. 'The Constitution does not require things which are different in fact . . . to be treated in law as though they were the same.' . . . Hence, legislation may impose special burdens upon defined classes in order to achieve permissible ends. But the Equal Protection Clause does require that, in defining a class subject to legislation, the distinctions that are drawn have 'some relevance to the purpose for which the classification is made.' " *Rinaldi v. Yeager*, 384 U.S. 305, 308-309, 16 L.Ed.2d 577, 580 (1966).

Recently, however, the Court has applied a stricter standard when considering statutory classifications touching "fundamental rights" of citizens. In such instances, the classification must be tested by "whether it promotes a compelling state interest. . . ." *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969). A suggestion that the stricter "compelling state interest" test should control the decision of this Court is illustrative of the danger inherent in taking quotations from cases in this field and applying them wholly out of the context in which they were propounded and to facts wholly different from those upon which they were based.

The "compelling governmental interest" test has been applied, for example, in determining the validity of statutes affecting the right of citizens to travel freely interstate (*Shapiro v. Thompson*, 394

U.S. 618 (1969)), or of a political party to find a place on the Ohio ballot (*Williams v. Rhodes*, 393 U.S. 23 (1968)). It has most recently been applied with regard to statutes restricting the right to vote to certain groups of persons in annual school board elections (*Kramer v. Union Free School District*, 395 U.S. 621 (1969)), revenue bond elections (*Cipriano v. City of Houma*, 395 U.S. 701 (1969)) and general obligation bond elections (*City of Phoenix v. Kolodziejski*, ... U.S. ....., 26 L.Ed.2d 523 (1970)). But the Court has repeatedly held, in cases in which a fundamental right of citizens is not directly affected, that the traditional "rational relation" test will be employed in assessing the constitutional validity of a statutory classification. This point has been most lucidly established by this Court, with particular relevance to the supermajority vote requirements here at issue, in *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802 (1969).

In *McDonald* this Court was presented with a "voting rights" case, but after devoting much of its opinion to ascertaining the equal protection test to be applied to the facts, elected not to treat the question as one affecting a "fundamental right" of citizens. In the following language the Court rejected the contention that all classifications affecting per-

sons in their capacity as voters must meet the "compelling state interest" test of constitutional validity:

> "Such an exacting approach is not necessary here, however, for two readily apparent reasons. First, the distinctions made by Illinois' absentee provisions are not drawn on the basis of wealth or race. Secondly, there is nothing in the record to indicate that the Illinois statutory scheme has an impact on appellants' ability to exercise the fundamental right to vote. It is thus not the right to vote that is at stake here but a claimed right to receive absentee ballots." 394 U.S. at 807.

Both of the "readily apparent reasons" for not applying the stricter test in *McDonald* are also readily apparent in the instant case. The supermajority vote requirements "are not drawn on the basis of wealth or race." Likewise, they do not have "an impact on [respondents'] ability to exercise the fundamental right to vote," more specifically defined to mean that the statutes "do not themselves deny [respondents] the exercise of the franchise . . ." The provisions here in issue do not deny the exercise of the franchise to any voter but merely set the plurality necessary for the adoption of a taxing measure when submitted for popular approval. Since neither factor was present in the challenged Illinois statute, "the more traditional standards" of the rational relation test were applied. The validity of the West Virginia provisions should also be determined by those same traditional standards propounded in

Rinaldi v. Yeager and reaffirmed so clearly in *McDonald*.

III. The History And Experience of Washington with its Supermajority Vote Rules is Relevant to Assist the Court in Determining Their Rational Relation to the State Objective to Limit Property Taxation As A Means of Raising Governmental Revenue.

The supermajority vote requirements for the approval of taxing measures at issue in this case do not touch what has been termed a fundamental right of citizens. Their constitutional validity, therefore, is determined by whether they are rationally related to the achievement of a permissible governmental objective. This determination must necessarily involve consideration by the Court of the purpose and background of such supermajority provisions. Because of the similarity of Washington's 40-mill laws to the West Virginia provisions, we believe a concise analysis and review of this state's experience under its laws would be of material assistance to the Court.

A. Special Levies Under Amendment 17

Amendment 17 to the Washington Constitution, prescribing a 40-mill limit on property taxation but permitting levies in excess of this limit if approved by a 60% affirmative vote, was adopted at the gen-

eral election November 7, 1944, by a vote of 357,488 in favor to 179,273 opposed. This adoption culminated an uninterrupted series of enactments by initiative and referendum, all of which embodied the requirement of a 60% affirmative vote before a 40-mill limit could be exceeded. The votes on the measures were as follows:

		For	*Against*	*Percent Affirmative*
1932	(Initiative)	303,384	190,619	61.4%
1934	"	219,635	192,168	53.3%
1936	"	417,641	120,478	77.6%
1938	"	340,296	149,534	69.5%
1940	(Referendum)	390,639	149,843	72.3%
1942	"	252,431	75,540	77.0%

Through these direct enactments the people of the state of Washington expressed very forceably their policy decision to shift the principal tax reliance in Washington from property to other sources. The passage of these initiatives and referenda, and ultimately of Amendment 17, was motivated by facts and events which had a profound effect on Washington citizens and which convinced them of the need to place a rational ceiling on the property tax as a means of raising governmental revenue. Professor Harsch, in *The Washington Tax System —How It Grew*, 39 Wash. L.Rev. 944 (1965), states:

> "The complaints of owners of real property and those owners of personal property which did not escape listing on the tax rolls grew more and more audible during the 'twenties'. These complaints were against both the

obvious unevenness in the distribution of the property tax load among property owners and the high rates of tax levy in many parts of the state.

* * * *

"Adoption of amendment fourteen [requiring that taxation of property of the same class be levied uniformly—approved by voters in 1930], however, did not insure that property owners would obtain the relief they desired from high property taxes. There existed an increasing belief that other sources of revenue should be utilized to meet the rising costs of both state and local government units, costs which were unquestionably due to the popular demand for more and better highways, more and better schools, increased health and sanitation facilities, and more parks, playgrounds, and recreational facilities. In addition, the nationwide economic depression which followed the break in the business boom of the middle and late 1920's added businessmen and farmers as well as homeowners to the property owners who demanded relief from the unreasonable and inequitable burden which they felt the existing tax structure placed upon them" *Id* at 956, 958.

In response to the passage of the 40 mill initiative measures the Washington Legislature in 1933 and 1935 dramatically changed the entire tax structure of the state. For the first time a sales tax was enacted and new excise taxes were imposed. Chapter 191, Laws of 1933; Chapter 57, Laws of 1933, Ex. Sess.; Chapter 180, Laws of 1935. These changes, combined with the 40 mill limit, greatly reduced the state's relative dependence on property taxes. For a

time this new taxing system resulted in a reduction in the dollar amount of property taxes collected. Dr. John F. Sly, then Director of Princeton Surveys, stated in the first of his series of reports entitled *Tax Developments in Washington State—How We Got This Way*, published in 1956 by the Washington State Research Council:

> "The impact of the Forty-mill Law was, as it was expected to be, tremendous. In the first full year of its application (1934), property tax levies fell to $54 million. Five years later (1938), they had fallen to $42 million. Barred from income taxes, heavily restricted on property taxes, there was only one way to go—excises and sales. 'Replacements' were hastily provided by the Legislature. . . .
>
> "By 1935, however, the Legislature had pretty well rounded out its replacement program. It was composed of the so-called business and occupation tax—a classified gross sales tax; a retail (2 per cent) sales and use tax; a tax on fuel oil; a tax on admissions to places of amusement; a tax on cigarettes; a tax on liquor; and a tax on conveyances. This gave Washington one of the broadest programs of state sales and excise taxes in the country. The effect of this program on Washington tax policy and tax structure was clear and dramatic:
>
> "From 1931 to 1939 total property taxes declined from $80 million to $41.6 million—from 80 per cent to 42 per cent of total state and local revenues.
>
> "Total state revenues (except property) increased from $20.5 million in 1931 to $57.3 million in 1939—from 20.6 per cent to 58 per cent of total state and local revenues.

"In 1931, some two-thirds of all revenues were collected and spent by local governmental agencies; by 1939, the State was collecting almost two-thirds of all revenues and local governmental agencies about one-third.

"This was the beginning of what was known as 'replacement' on the tax side, and 'state aid' on the service side—particularly for schools, highways, and welfare." *Id* at 10-11.

The popular decision to limit property taxes was accompanied by a concurrent popular decision to provide a procedure whereunder the affected voters of a taxing district could permit the limit to be exceeded. But if the limit was to succeed in shifting a significant portion of the tax burden away from property, the people believed the limit must be one which could not be exceeded automatically but only upon a strong showing to the voters of a taxing district that the requested excess property taxation was necessary. Otherwise the purpose of relieving the burden on the property taxpayer could be easily frustrated. The people conclued that at any special election in which a 60% affirmative vote could be obtained, the objective of this part of the 40 mill law —to permit excess levies only on a clear showing of need by the taxing district—would have been convincingly met in the minds of the voters. This policy decision made directly by the people on the numerous times they approved the 40 mill limit was, simply stated, that a requirement of a 60% affirmance for

excess levies would prevent the wholesale circumvention of the desired limit on property taxes.

It is significant to observe that Amendment 17 could itself be amended by a majority vote of the people. They have not chosen to amend it. In fact, several liberalizing amendments have recently been rejected which would have permitted an approval granted at one special election to apply to excess levies for more than one year. The following is a summary of these measures and the popular vote rejecting them:

	For	*Against*	*Percent Against*
SHJR 4, Laws of 1957, pg 1302 (Submitted November 1958)	293,386	483,165	62.6%
SSJR 1, Laws of 1961, pg 2749 (Submitted November 1962)	249,489	597,928	70.6%
SJR 23 (Submitted November 1968)	407,248	625,016	60.5%

This refusal of the people to alter the rules established by them for authorizing excess levy assessments indicates that the maintenance of stringent requirements for permitting increases in property tax assessments above the 40 mill limit remains of prime importance to the Washington voter.

In summary, the preceding historical information demonstrates that the 40 mill laws set the tax structure of Washington on a completely new course. Property taxes immediately declined as the major source of revenue in Washington and were replaced

by alternate sources of governmental moneys. The original options of the people in developing the laws to accomplish this change were to adopt an inflexible limit or to provide a procedure for exceeding the limit only upon a strong showing that higher property taxation was required. The option they selected bears a rational relation to the achievement of the desired objective.

B. RESTRICTIONS ON INCURRENCE OF BONDED DEBT —AMENDMENT 27

Article VIII, Section 6, a part of the original Washington Constitution adopted in 1889, and Amendment 27, adopted in 1952, limit local units of government to an indebtedness of specified percentages of the value of taxable real property within a taxing district, but provide that certain indebtedness in excess of these percentages may be incurred with the approval of a 60% majority vote of the voters in the affected district. These constitutional provisions are a reflection of the decision of Washington citizens to maintain a tight rein on proposals of taxing districts to encumber property for long periods of time by bonding measures adopted at a single election. Like the 40 mill laws, the 60% affirmative vote requirement of these provisions was designed to require taxing districts to persuade more than a mere

majority of the necessity for incurring long-term debt.

The motivation for this policy decision is understandable. In most functions of government, action approved by a majority today can be amended or repealed by a majority tomorrow if facts and circumstances have changed or if the enactment has proved to be unwise. The authorization and incurrence of bonded indebtedness by components of state government, however, irrevocably encumbers property in the taxing jurisdiction for years or even decades. Because of the enduring effect of such a vote, the people, in framing this constitutional requirement, expressed their belief that more than a mere majority of today's voters ought to be persuaded of the merits of the proposal. The supermajority vote requirement is designed to require a persuasive showing of need in order to protect later voters who will be affected by the vote but who will be powerless to alter its effect on their vital interests.

CONCLUSION

For the aforestated reasons, the State of Washington, by its Attorney General, and G. Keith Grim, as *amici curiae* respectfully urge this Court to adopt the position of the petitioners herein, to reverse the decision of the Supreme Court of Appeals of West Virginia, and to declare the supermajority vote provisions of the West Virginia Constitution to be valid and constitutional.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 96

A. T. GORDON, ET AL.,
Petitioners and
Intervening Defendants Below,

vs.

GRANVILLE H. LANCE, ET AL.,
Respondents and Plaintiffs Below,

AND

THE BOARD OF EDUCATION OF THE COUNTY OF ROANE, *a corporation,* ET AL.,
Respondents and Defendants Below.

AMICI CURIAE BRIEF

ON BEHALF OF
THE CITY OF SAN DIEGO, CALIFORNIA
AND THE COUNTY OF SAN DIEGO, CALIFORNIA

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 96

A. T. GORDON, ET AL.,
Petitioners,

vs.

GRANVILLE H. LANCE, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

AMICI CURIAE BRIEF

ON BEHALF OF
THE CITY OF SAN DIEGO, CALIFORNIA
AND THE COUNTY OF SAN DIEGO, CALIFORNIA

This brief amici curiae is filed on behalf of the City of San Diego in the State of California and the County of San Diego in the State of California, and is sponsored by the City Attorney of the City of San Diego and the County Counsel of the County of San Diego, who are the authorized law officers thereof, under Rule 42(4) of the Rules of the Supreme Court of the United States.

QUESTION PRESENTED

Should this Court determine that the extraordinary majority vote requirement imposed by state constitutions and statutes upon the passage of bond measures violates the United States Constitution, what, if any, retroactive effect should be given to the decision?

INTEREST OF AMICI CURIAE

The interest of the City of San Diego, California, and the County of San Diego, California, is that the United States Supreme Court, when it decides the issue regarding the constitutionality of extraordinary majority vote requirements imposed by states upon the passage of bond measures, also determine the retroactive application which may be given to such decision by the courts of the states which impose such requirements. This interest to amici is particularly important in that any decision of the United States Supreme Court should not foreclose the application of such decision in the manner provided by the California Supreme Court in *Westbrook* v. *Mihaly*[1] which case is pending on appeal to this court.

The City of San Diego, pursuant to Ordinance No. 10386, dated August 27, 1970, held a municipal bond election on November 3, 1970, for the purpose of issuing bonds to develop an historical and cultural park. That bond election occurred after the California Supreme Court held a two-thirds affirmative vote requirement violated the Equal Protection Clause of the Fourteenth Amendment, and after that state court decision became final under California court rules.[2]

City Proposition D, appearing on the November 3, 1970 ballot received 103,469 affirmative votes in favor of the City of

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[1] *Westbrook* v. *Mihaly* (1970) 2 Cal. 3d 765 [87 Cal. Rptr. 839, 471 P. 2d 487] (U. S. Supreme Court Appeal Pending).

[2] *Westbrook* v. *Mihaly*, supra, n. 1. The California Supreme Court in holding a two-thirds affirmative vote requirement of Section 18 of Article XI (new section 40 of Article XIII), California Constitution was invalid, stated that their decision shall ". . . be applied only to elections held after the date upon which this decision becomes final in this court." 2 Cal. 3d 765 at p. 801.

San Diego incurring the bonded indebtedness, and 96,473 negative votes against the assumption of additional indebtedness.

This amounted to 51.07 percent of the electors casting affirmative votes, and 48.93 percent casting negative votes.

The explanation required by law which accompanied the sample ballot mailed to each voter contained the following statement regarding Proposition D:

> "Under present case law it is now uncertain whether this proposition to incur bonded indebtedness must be authorized by an affirmative vote of a simple majority or a majority of two-thirds (2/3) of the qualified electors voting on the bond proposition. If this proposition to incur bonded indebtedness receives the majority number of votes of the qualified voters of the City voting on this proposition, as required by law, general obligation bonds of the City in an amount not to exceed the principal amount stated in the proposition may be issued and sold for the object and purpose as contained in such proposition."

The County of San Diego, pursuant to Resolution No. 99 adopted by the Board of Supervisors of San Diego County August 25, 1970, ordered and held a bond election on November 3, 1970, for the purpose of issuing bonds to acquire real property for open spaces for parks, recreation and other compatible public purposes. That bond proposition, identified as Proposition A on the ballot, received 63.7% of the votes cast, the tally of such votes being:

FOR ISSUANCE OF BONDS	236,326 votes	(63.7+%)
AGAINST ISSUANCE OF BONDS	134,620 votes	(36.3—%)

The resolution of the Board of Supervisors of the County of San Diego adopted on August 25, 1970, ordering this Proposition A to be placed on the ballot, was published in a newspaper of general circulation as required by law for such elections, and a part of such resolution provided:

> "That if the proposition for the incurring of bonded indebtedness so submitted receives the requisite number of votes required by law, bonds of said county, in an amount not exceeding the principal amount stated in such proposition, shall be issued and sold."

The impartial analysis of the bond measure which was mailed[3] to each voter read:

> "Proposition A authorizes the Board of Supervisors to issue and sell general obligation bonds of the County of San Diego not to exceed $7,000,000 to provide funds for the acquisition of real property as open space for parks, recreation and other public purposes compatible therewith. Under the present case law whether these bonds must be authorized by an affirmative vote of a majority or of two-thirds (2/3rds) of the qualified electors voting on the bond proposition is now uncertain. . . ."

Because of the California Supreme Court's decision in the *Westbrook* case and other cases pending in the United States Supreme Court, the uncertainty of the vote required for bond measures to pass was also well publicized in the local press along with newspaper reports and coverage of these bond elections. The electors voting on these propositions—both the proposition submitted by the City of San Diego and the proposition submitted by the County of San Diego—were well apprised of the unsettled state of the law regarding the number of votes required to carry such a proposition.

If the holding of *Westbrook* v. *Mihaly* is approved, the bonds which were approved by majority vote at our elections can

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[3] An impartial analysis of a bond measure showing the effect of the measure on the existing law and the operation of the measure is required to be prepared, printed and mailed to each voter along with the arguments for and against the measure at least 10 days before the election. (Calif. Elections Code §§ 3780-3786 and 10012.)

be issued and sold if effect may be given to the determination by the California Supreme Court to apply that holding to all elections held after the date that decision became final as to that court.

ARGUMENT

Amici do not argue the issue of whether or not the extraordinary vote requirement for bond measures is constitutionally impermissible. That has been ably and amply presented by the parties to this litigation. But should this honorable court determine that the extraordinary majority vote requirement is invalid, the application of such decision on elections already held must be considered. It is the purpose of amici to note to the court this problem as it relates to them so that this court's decision will neither foreclose the consideration of this matter when the California case of *Westbrook* v. *Mihaly*, now pending on appeal, is considered nor foreclose the application given to the rule by the California Supreme Court.

The California Supreme Court held the extraordinary majority vote requirement for bond elections violative of the United States Constitution, in a decision filed June 30, 1970, and modified July 15, 1970. That decision provided:

> ". . . [W]e consider it fairer and wiser that only prospective effect be given to our decision and that its rule be applied only to elections held after the date upon which this decision becomes final in this court."[4] (*Westbrook* v. *Mihaly*, supra, at 801.)

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[4] The decision became final under California law on July 30, 1970. "A decision of the [California] Supreme Court becomes final 30 days after filing. . . . Where an opinion is modified [before it becomes final] without change in the judgment . . . such modification shall not postpone the time that the decision becomes final. . . ." (California Rules of Court Rule 24 subd. (a) and Rule 27 subd. (a); cf. California Code Civ. Proc., § 1049.)

After the decision by the California Supreme Court, local agencies in California, particularly the City of San Diego and the County of San Diego, amici herein, ordered bond elections to be held. The attention of the voters was called to the fact that the California Supreme Court had held the extraordinary vote requirement invalid but, because of cases pending in higher courts, a conclusively determinative decision on the vote requirement could not be made. Voters casting their ballots were aware that a majority approval might ultimately be held sufficient for such measures to pass. An implicit or express qualification of such measures is that, should the United States Supreme Court approve or affirm the state's holding, a bond proposition receiving the affirmative approval of a majority of the voters will carry. Many capital projects have been delayed awaiting the decision of this court and, if additional elections are required, additional expenditures of public funds will be necessary.

It has been long recognized by this honorable court that

> "A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward." (*Great Northern Railway Company* v. *Sunburst Oil & Refining Company* [1932] 287 U. S. 258, 364.)

See *Linkletter* v. *Walker* (1965) 381 U. S. 618, *Cipriano* v. *City of Houma* (1969) 395 U. S. 701, 706, *Phoenix* v. *Kolodziejski* (1970) ..... U. S. ....., 26 L. Ed. 2d 523, 530.

The California Supreme Court in *Westbrook* v. *Mihaly* defined the limits of adherence to the precedent announced in that case: i.e., that the precedent would apply to all elections held after July 30, 1970—the date that decision became final under California law. Thus, if the precedent announced in *Westbrook* v. *Mihaly* is approved or affirmed by this honorable

court, the definition of the limits of adherence announced by the California Supreme Court should not be so limited as to deprive public entities who have relied upon it since the announcement of its benefits.

Respectfully submitted,

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Dated: January 1971

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

GORDON ET AL. *v.* LANCE ET AL.

CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 96. Argued January 18, 1971—Decided June 7, 1971

West Virginia's constitutional and statutory requirement that political subdivisions may not incur bonded indebtedness or increase tax rates beyond those established by the State Constitution without the approval of 60% of the voters in a referendum election does not discriminate against or authorize discrimination against any identifiable class and does not violate the Equal Protection Clause or any other provision of the United States Constitution. *Gray* v. *Sanders*, 372 U. S. 368, and *Cipriano* v. *City of Houma*, 395 U. S. 701, distinguished. Pp. 2–6.

— W. Va. —, 170 S. E. 2d 783, reversed.

BURGER, C. J., delivered the opinion of the Court, in which BLACK, DOUGLAS, STEWART, WHITE, and BLACKMUN, JJ., joined. HARLAN, J., filed a statement concurring in the result. BRENNAN and MARSHALL, JJ., filed a dissenting statement.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 96.—October Term, 1970

A. T. Gordon et al.
Petitioners,
v.
Granville H. Lance et al.

On Writ of Certiorari to the Supreme Court of Appeals of West Virginia.

[June 7, 1971]

Mr. Chief Justice Burger delivered the opinion of the Court.

We granted certiorari to review a challenge to a 60% vote requirement to incur public debt as violative of the Fourteenth Amendment.

The Constitution of West Virginia and certain West Virginia statutes provide that political subdivisions of the State may not incur bonded indebtedness or increase tax rates beyond those established by the constitution without the approval of 60% of the voters in a referendum election.

On April 29, 1968, the Board of Education of Roane County, West Virginia, submitted to the voters of Roane County a proposal calling for the issuance of general obligation bonds in the amount of $1,830,000 for the purpose of constructing new school buildings and improving existing educational facilities. At the same election, by separate ballot, the voters were asked to authorize the Board of Education to levy additional taxes to support current expenditures and capital improvements. Of the total votes cast, 51.55% favored the bond issues and 51.51% favored the tax levy. Having failed to obtain the requisite 60% affirmative vote, the proposals were declared defeated.

Following the election, respondents appeared before the Board of Education on behalf of themselves and other persons who had voted in favor of the proposals and demanded that the Board authorize the bonds and the additional taxes. The Board refused.

Respondents then brought this action, seeking a declaratory judgment that the 60% requirements were unconstitutional as violative of the Fourteenth Amendment. In their complaint they alleged that the Roane County schools had been basically unimproved since 1946 and fell far below the state average, both in classroom size and facilities. They further alleged that six similar proposals had been previously defeated, although each had received majorites of affirmative votes ranging from 51.51% to 55.84%. The West Virginia trial court dismissed the complaint. On appeal, the West Virginia Supreme Court of Appeals reversed, holding that the state constitutional and statutory 60% requirements violated the Equal Protection Clause of the Fourteenth Amendment. 170 S. E. 2d 783 (W. Va. 1969). We granted certiorari, 397 U. S. 1020 (1970), and for the reasons set forth below, we reverse.

The court below relied heavily on two of our holdings dealing with limitations on the right to vote and dilution of voting power. The first was *Gray* v. *Sanders*, 372 U. S. 368 (1963), which held that Georgia's county-unit system violated the Equal Protection Clause, because the votes of primary electors in one county were accorded less weight than the votes of electors in other counties. The second was *Cipriano* v. *City of Houma*, 395 U. S. 701 (1969), in which we held impermissible the limitation to "property taxpayers" of the right to vote in a revenue bond referendum. From these cases the state court concluded that West Virginia's requirement was constitutionally defective, because the votes of those who favored the issuance of the bonds had a proportion-

ately smaller impact on the outcome of the election than the votes of those who opposed issuance of the bonds.

We conclude that the West Virginia court's reliance on the *Gray* and *Cipriano* cases was misplaced. The defect this Court found in those cases lay in the denial or dilution of voting power because of group characteristics—geographic location and property ownership—that bore no valid relation to the interest of those groups in the subject matter of the election; moreover, the dilution or denial was imposed irrespective of how members of those groups actually voted.[1]

Thus in *Gray, supra,* at 381 n. 12, we held that the county-unit system would have been defective even if unit votes were allocated strictly in proportion to population. We noted that if a candidate received 60% of the votes cast in a particular county he would receive that county's entire unit vote, the 40% cast for the other candidates being discarded. The defect, however, continued to be geographic discrimination. Votes for the losing candidates were discarded solely because of the county where the votes were cast. Indeed, votes for the winning candidate in a county were likewise devalued, because all marginal votes for him would be discarded and would have no impact on the state-wide total.

Cipriano was no more than a reassertion of the principle, consistently recognized, that an individual may not be denied access to the ballot because of some extraneous condition, such as race, *e. g., Gomillion* v. *Lightfoot,* 364 U. S. 339 (1960); wealth, *e. g., Harper* v. *Virginia Board of Elections,* 383 U. S. 663 (1966); tax status, *e. g., Kramer* v. *Union Free School Dist.,* 395 U. S. 621 (1969);

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[1] While *Cipriano* involved a denial of the vote, a percentage reduction of an individual's voting power in proportion to the amount of property he owned would be similarly defective. See *Stewart* v. *Parish School Board,* 310 F. Supp. 1172 (ED La.), aff'd, 400 U. S. 884 (1970).

or military status, *e. g.*, *Carrington* v. *Rash*, 380 U. S. 89 (1965).

Unlike the restrictions in our previous cases, the West Virginia Constitution singles out no "discrete and insular minority" for special treatment. The three-fifths requirement applies equally to all bond issues for any purpose, whether for schools, sewers, or highways. We are not, therefore, presented with a case like *Hunter* v. *Erickson*, 393 U. S. 385 (1969), in which fair housing legislation alone was subject to an automatic referendum requirement.

The class singled out in *Hunter* was clear—"those who would benefit from laws barring racial, religious, or ancestral discriminations," *supra*, at 391. In contrast we can discern no independently identifiable group or category that favors bonded indebtedness over other forms of financing. Consequently no sector of the population may be said to be "fenced out" from the franchise because of the way they will vote. Cf. *Carrington* v. *Rash*, *supra*, at 94.

Although West Virginia has not denied any group access to the ballot, it has indeed made it more difficult for some kinds of governmental actions to be taken. Certainly any departure from strict majority rule gives disproportionate power to the minority. But there is nothing in the language of the Constitution, our history or our cases that requires that a majority always prevail on every issue. On the contrary, while we have recognized that state officials are normally chosen by a vote of the majority of the electorate, we have found no constitutional barrier to the selection of a governor by a state legislature, after no candidate received a majority of the popular vote. *Fortson* v. *Morris*, 385 U. S. 231 (1966).

The Federal Constitution itself provides that a simple majority vote is insufficient on some issues; the provisions

on impeachment and ratification of treaties are but two examples. Moreover, the Bill of Rights removes entire areas of legislation from the concept of majoritarian supremacy. The constitutions of many States prohibit or severely limit the power of the legislature to levy new taxes or to create or increase bonded indebtedness.[2] thereby insulating entire areas from majority control. Whether these matters of finance and taxation are to be considered as less "important" than matters of treaties, foreign policy or impeachment of public officers is more properly left to the determination by the States and the people than to the courts operating under the broad mandate of the Fourteenth Amendment. It must be remembered that in voting to issue bonds voters are committing, in part, the credit of infants and of generations yet unborn, and some restriction on such commitment is not an unreasonable demand. That the bond issue may have the desirable objective of providing better education for future generations goes to the wisdom of an indebtedness limitation: it does not alter the basic fact that the balancing of interests is one for the State to resolve.

Wisely or not, the people of the State of West Virginia have long since resolved to remove from a simple majority vote the choice on certain decisions as to what indebtedness may be incurred and what taxes their children will bear.

We conclude that so long as such provisions do not discriminate against or authorize discrimination against any identifiable class they do not violate the Equal Protection Clause.[3] We see no meaningful distinction

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[2] *E. g.*, Indiana Constitution, Art. 10, § 5; Ohio Constitution, Art. 8, § 3; Texas Constitution, Art. 3, § 49; Wisconsin Constitution, Art. 8, § 4.

[3] Compare *Reitman* v. *Mulkey*, 387 U. S. 369 (1967).

between such absolute provisions on debt, changeable only by constitutional amendment, and provisions that legislative decisions on the same issues require more than a majority vote in the legislature. On the contrary, these latter provisions may, in practice, be less burdensome than the amendment process.[4] Moreover, the same considerations apply when the ultimate power, rather than being delegated to the legislature, remains with the people, by way of a referendum. Indeed, we see no constitutional distinction between the 60% requirement in the present case and a state requirement that a given issue be approved by a majority of all registered voters. Cf. *Clay* v. *Thornton*, 253 S. C. 209, 169 S. E. 2d 617 (1969), appeal dismissed, 397 U. S. 39 (1970).[5]

That West Virginia has adopted a rule of decision, applicable to all bond referenda, by which the strong consensus of three-fifths is required before indebtedness is authorized, does not violate the Equal Protection Clause or any other provision of the Constitution.[6]

Reversed.

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[4] Some 14 States require an amendment to be approved by two sessions of the legislature, before submission to the people. West Virginia's Constitution, Art. 14, § 2, provides for approval by two-thirds of a single legislature and a majority of the voters.

[5] In practice, the latter requirement would be far more burdensome than a 60% requirement. There were 8,913 registered voters in Roane County in 1968, of whom 5,600 voted in the referendum at issue. If a majority of all eligible voters had been required, approval would have required the affirmative votes of over 79% of those voting. See State of West Virginia, Official Returns of 1970 Primary Election (including the 1968 registration figures).

[6] We intimate no view on the constitutionality of a provision requiring unanimity or giving a veto power to a very small group. Nor do we decide whether a State may, consistent with the Constitution, require extraordinary majorities for the election of public officers.

MR. JUSTICE HARLAN concurs in the result for the reasons stated in his separate opinion in *Whitcomb* v. *Chavis, ante,* — U. S. —.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would affirm for the reasons expressed in the opinion of the West Virginia Supreme Court of Appeals, 170 S. E. 2d 783 (W. Va. 1969).